93-620

No. ——

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

MILENA SHIP MANAGEMENT COMPANY, LTD.,
SOUTH CROSS SHIPPING, LTD.,
SOUTH ADRIATIC BULK SHIPPING LIMITED, AND
GULF & EASTERN STEAMSHIP AND CHARTERING CORP.,
Petitioners,

v.

R. RICHARD NEWCOMB, DIRECTOR,
OFFICE OF FOREIGN ASSETS CONTROL OF THE
DEPARTMENT OF THE TREASURY, AND
JAMES MURRAY, SENIOR SPECIAL AGENT,
UNITED STATES CUSTOMS SERVICE,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Office of Foreign Assets Control ("OFAC") of the Department of the Treasury act arbitrarily, capriciously, erroneously as a matter of law, or in violation of petitioners' due process rights when it blocked petitioners' Maltese flag vessels without an administrative record by merely "presuming" that the vessels are property belonging to the Yugoslav Government and therefore subject to economic sanctions under Executive Order Nos. 12808 and 12810?

2. Did the Fifth Circuit violate this Court's controlling jurisprudence in relying on OFAC's post hoc rationalizations for the blocking orders and administrative decision?

3. Did the Fifth Circuit err in reviewing and affirming OFAC's interpretation of Yugoslav and Montenegrin law?

4. Did the Fifth Circuit err in refusing to order OFAC to provide for the maintenance of the blocked vessels?

LIST OF INTERESTED PERSONS AND RULE 29.1 NOTATION

The parties to the proceedings below were petitioners—Milena Ship Management Company, Ltd., South Cross Shipping, Ltd., South Adriatic Bulk Shipping Limited, and Gulf & Eastern Steamship and Chartering Corp.—and respondents—R. Richard Newcomb, Director, Office of Foreign Assets Control of the Department of the Treasury, and James Murray, Senior Special Agent, United States Customs Service.

Petitioners certify under Rule 29.1 that Milena Ship Management Company, Ltd., South Cross Shipping, Ltd., and South Adriatic Bulk Shipping Limited are Maltese Limited Partnerships. They are affiliates of Jugoslavenska Oceanska Plovidba of Kotor, Montenegro, which has issued shares to the public and to Boka Ocean Shipping Corporation of Monrovia, Liberia.

Gulf & Eastern Steamship and Chartering Corp., a Louisiana corporation, has no parent company, subsidiary, or affiliate that has issued shares to the public.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners—Milena Ship Management Company, Ltd., South Cross Shipping, Ltd., South Adriatic Bulk Shipping Limited, and Gulf & Eastern Steamship and Chartering Corp.—respectfully ask this Court to grant certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this civil proceeding on July 21, 1993.

OPINIONS BELOW

The opinion of the Fifth Circuit is reported at 963 F.2d 806. It is reprinted in the appendix hereto, pp. 1a-9a, *infra*.

The judgment and orders and reasons of the United States District Court for the Eastern District of Louisiana that were the subject of the appeal are reported at 804 F.Supp. 846, 804 F.Supp. 855, and 804 F.Supp. 859. They are likewise reprinted in the appendix at pp. 10a-45a, *infra*.

OFAC's notices enforcing Executive Order Nos. 12808 and 12810 are reprinted in the appendix at pp. 56a-61a, *infra*. OFAC's administrative decision of September 18, 1992 is reprinted in the appendix at pp. 102a-118a, *infra*.

JURISDICTION

Invoking federal jurisdiction under 5 U.S.C. §§ 701-706 (the Administrative Procedure Act), 28 U.S.C. § 1331, and 28 U.S.C. § 1361, petitioners filed suit for declaratory, injunctive, and mandamus relief in the Eastern District of Louisiana, seeking judicial review of OFAC's final agency actions in blocking their vessels and later refusing to unblock them. The district court denied petitioners' request for a preliminary injunction (Appendix 11a-28a). In subsequent orders and reasons, the court denied their motion to appoint a provisional custodian to maintain the vessels (Appendix 29a-35a) and their motion for summary judgment on the merits of their claims (Appendix 36a-43a). Following a stipulation and order submitting the matter to the court on the existing record (Appendix 44a-45a), the district court entered judgment on October 6, 1992 dismissing the suit (Appendix 10a).

On petitioners' appeal, the Fifth Circuit entered a judgment and opinion on July 21, 1993, affirming the decision of the district court (Appendix 1a-9a).

On October 8, 1993, petitioners filed an application for extension of time to file a petition for writ of certiorari in this Court, which Justice Scalia denied. Nevertheless, petitioners have timely filed this petition within ninety (90) days of the date of the Fifth Circuit's judgment, as provided by 28 U.S.C. § 2101(c) and this Court's Rule 13.1. Petitioners now invoke the jurisdiction of this Court under 28 U.S.C. 1254(1).

STATUTES INVOLVED

This case implicates the Fifth Amendment of the Constitution of the United States and the following federal statutes: 5 U.S.C. §§ 702, 704, and 706 (the Administrative Procedure Act) and 50 U.S.C. §§ 1701-1706 (the International Emergency Economic Powers Act). The full texts of these provisions are set forth in the appendix at pp. 119a-127a.

The case further implicates Executive Order Nos. 12808 and 12810. The full texts of those orders are set forth in the appendix at pp. 46a-55a.

STATEMENT OF THE CASE

A. Preface

This petition raises important questions concerning due process, separation of powers, and proper standards of judicial review of OFAC's agency actions under presidential executive orders imposing sanctions against the Yugoslav Government. Petitioners are the manager, owners, and agent of Maltese flag vessels that the respondent officers of the U.S. Department of the Treasury and the Customs Service have confined in United States ports since June 1992, purportedly to enforce Executive Orders Nos. 12808 and 12810, which block property of the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) and its controlled entities. The target of OFAC's blocking orders is petitioners' affiliate, Jugoslavenska Oceanska Plovidba ("JOP"), an international com-

mercial shipping company headquartered in Kotor, Montenegro. OFAC blocked the vessels based on an arbitrary, capricious, and legally erroneous "presumption" that all property of entities located in Yugoslavia is owned or controlled by the Yugoslav Government. OFAC made its presumption and blocked petitioners' vessels without any knowledge of Yugoslav and Montenegrin law, without any factual knowledge of petitioners or their corporate structures, and without any prior consultation with the U.S. State Department or review of the Treasury Department's own published opinion concerning property ownership in Yugoslavia.

The district court and the Fifth Circuit have denied petitioners any judicial relief, upon concluding that OFAC's presumption was "reasonable" and that OFAC's post hoc interpretations of Yugoslav law were correct. The Fifth Circuit reached this decision, even though every expert in foreign law offering an opinion in this case had concluded that JOP and petitioners are not owned or controlled by the Yugoslav Government. Unless corrected, the Fifth Circuit's judgment will condone OFAC's arbitrary, capricious, and legally erroneous conduct in violation of petitioners' due process rights and controlling law. The decisions below are in direct conflict with this Court's jurisprudence. If allowed to stand, they will set a dangerous precedent in future cases. This case, which presents far-reaching questions concerning the limits of administrative power and the scope of judicial review, warrants this Court's review.

B. Administrative Proceedings

In Executive Order 12808 of May 30, 1992 (Appendix, 46a-49a) and Executive Order 12810 of June 5, 1992 (Appendix, 50a-55a), President Bush imposed economic and diplomatic sanctions against the newly-formed Federal Republic of Yugoslavia (Serbia and Montenegro) after the outbreak of civil war in the former Socialist Federal Republic of Yugoslavia. Exercising his authority

under 50 U.S.C. § 1710, *et seq.*, the International Emergency Economic Powers Act ("IEEPA"), the President authorized the Department of Treasury, in consultation with the State Department, to block all property in the United States owned by the Yugoslav Government or its controlled entities. He further prohibited U.S. persons from engaging in certain transac.ons, including the importation or exportation of any goods or property to or from Yugoslavia.

The executive orders targeted only government-owned property. They did not block the private property of Yugoslav nationals or Yugoslav business entities found in the United States. In a letter to congressional leaders, the President declared his intention to block the property of the Governments of Serbia and Montenegro in order to "prevent those governments from drawing on monies and properties within U.S. control." (Appendix, 63a).

Purporting to enforce the executive orders, respondent R. Richard Newcomb, Director of OFAC, blocked four Maltese flag merchant vessels—the M/V ZETA and the M/V MOSLAVINA in the Port of New Orleans and the M/V KAPETAN MARTINOVIC and the M/V DURMITOR, in the Ports of Savannah and Baltimore, beginning on June 19, 1992. The target of OFAC's blocking orders was Jugoslavenska Oceanska Plovidba ("JOP"), an international shipping company headquartered in Kotor, Montenegro. OFAC asserted that the Government of the Federal Republic of Yugoslavia owned or controlled JOP's property. However, public records documented that JOP had transferred the ownership and control of these vessels to petitioners' new companies located in Valletta, Malta before the effective dates of the executive orders. As early as 1984, JOP had formed offshore vessel-owning companies at the request of its western banking creditors who held mortgages on the vessels. JOP's commercial freedom to move assets offshore and to mortgage them to western banks certainly did not support OFAC's position that JOP was government-owned.

On July 6, 1992, after the blockings, OFAC notified officers of U.S. financial institutions that "[a]ll entities located or organized in Serbia and Montenegro, and their foreign subsidiaries, are *presumed* to be owned or controlled by the Government of Yugoslavia." (Emphasis added). OFAC attached a list of over 200 "blocked Yugoslav entities currently identified," including JOP among them (Appendix, 56a-57a). In a subsequent notice published on July 20, OFAC again listed JOP as one of the entities "owned or presumed to be controlled by the Government of the Federal Republic of Yugoslavia." OFAC defined the term "government" to include "[a]ny partnership, association, corporation, or other organization substantially owned or controlled" by the Yugoslav state and government, as well as "[a]ny other person or organization determined by the Director of the Office of Foreign Assets Control to be included within this section." (Appendix, 59a-61a). These notifications were the first explanations of OFAC's seizure of petitioners' vessels.

On July 6 and 10, 1992, Milena filed administrative petitions to OFAC, seeking to unblock the vessels or, alternatively, to obtain licenses that would permit them to trade in compliance with the executive orders. After a hearing on July 21, 1992, OFAC refused to unblock the vessels or grant any licenses, advising petitioners that it would defer its decision to the United Nations Sanctions Committee.

C. District Court Proceedings

Suffering devastating losses of revenue, reputation, and market share, petitioners filed a complaint in the Eastern District of Louisiana seeking judicial review of OFAC's initial blocking orders and its refusal to unblock the vessels. After an evidentiary hearing, the district court refused to grant a preliminary injunction upon concluding that it would not be in the public interest, even though it found that petitioners were suffering irreparable injury

(Appendix, 11a-28a). The district court thereafter denied petitioners' motion to appoint a provisional custodian to maintain and administer the vessels subject to the blocking orders, upon concluding that OFAC had not constructively seized them and had no duty to provide such relief (Appendix, 29a-35a).

While the suit was pending in the district court, OFAC submitted a written administrative decision (Appendix, 102a-118a) denying petitioners' request to unblock the vessels and filed its "administrative record" in the district court. After the court denied petitioners' motion for summary judgment seeking permanent injunctive and declaratory relief (Appendix, 36a-43a), the parties submitted the case on the court's record (Appendix, 44a-45a). The court then rendered a final judgment dismissing petitioners' suit (Appendix, 10a). The district court held that OFAC had committed no error of law and that its "decisions to block the vessels and then to deny the plaintiffs' petition for an unblocking were well within the bounds of reasonableness under the circumstances and thus do not constitute a reversible administrative determination." (Appendix, 40a).

D. Fifth Circuit Proceedings

The Fifth Circuit affirmed the district court (Appendix, 1a-9a). The court of appeals held that OFAC's initial blocking order was a final agency decision. The Fifth Circuit further acknowledged that OFAC did not have access to any relevant Yugoslav law when it first blocked the vessels. Nonetheless, the appellate court concluded that even without an administrative record OFAC had acted reasonably because it had to act "quickly" to implement the executive orders and because it could assume "based on its knowledge of governmental involvement in business enterprises under the recently ended communist regime, that there were still vestiges of pervasive government ownership and control in the present [Yugo-

slav] system." The Fifth Circuit further concluded that OFAC had correctly interpreted Yugoslav law in later denying petitioners' request to unblock the vessels. According to the Fifth Circuit, under either a deferential standard of review or a *de novo* review, JOP is not a private company. Ignoring the opinions of every Yugoslav legal expert in this matter, the appellate court concluded that the Government of Yugoslavia had ownership interest in JOP because of residual "social capital" within the enterprise. The appellate court further denied petitioners' request for a writ of mandamus to appoint a custodian for the vessels and pay for their maintenance. The Fifth Circuit concluded that the IEEPA did not expressly provide for such a custodian and that ordering the U.S. Government to appoint one or to reimburse petitioners for maintenance of the vessels would "shift the costs of the blocking from the sanctioned nation to the United States." (Appendix, 8a).

REASONS FOR GRANTING THE WRIT

I. OFAC EXCEEDED THE SCOPE OF THE EXECUTIVE ORDERS AND VIOLATED DUE PROCESS IN ADOPTING AN ARBITRARY PRESUMPTION AND BLOCKING THE VESSELS

If OFAC could suspend petitioners' constitutional rights and ignore the rule of law on grounds of "expediency" in enforcing the executive orders, petitioners would not be before this Court. Yet, OFAC cannot lawfully exceed the scope of its authority and the limits of its power. In this understaffed agency's zealous rush to activate the executive orders sanctioning the Yugoslav government, OFAC has unlawfully blocked the assets of non-governmental commercial enterprises. OFAC took final agency action and blocked petitioners' vessels on an empty administrative record without investigating the law

and the facts by consulting with the State Department. If left unchecked, OFAC's arbitrary action and abuse of power in this case will defy all concepts of justice and make a mockery of judicial review.

As this Court has stated, "The touchstone of due process is protection of the individual against arbitrary action of government." *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974). Administrative officers executing the provisions of a statute have no right to disregard the fundamental principles inherent in due process. *Yamataya v. Fisher*, 189 U.S. 86, 100 (1903). "The prohibitions of the Constitution were designed to apply to all branches of the National Government and they cannot be nullified by the Executive or by the Executive and the Senate combined." *Reid v. Covert*, 354 U S. 1, 17 (1957).

OFAC has exceeded the scope of its authority under the executive orders and has violated petitioners' due process rights in adopting its arbitrary presumption of governmental ownership and depriving petitioners of their property. Unless this Court grants certiorari and rectifies OFAC's abuse, this case sets a dangerous precedent for federal agencies to ignore the limits of their authority with impunity. Petitioners' constitutional rights and the federal court's powers of review are at stake in this case.

Executive Order Nos. 12808 and 12810 expressly limit the scope of OFAC's authority to block property. President Bush had the power under 50 U.S.C. § 1702(a)(1)(B) of the IEEPA to order the blocking of "any property in which any foreign country or a national thereof has any interest." Instead, he limited economic sanctions to property owned or controlled by the Yugoslav Government. OFAC unlawfully expanded the executive orders by adopting a blanket "presumption" that the Yugoslav Government owned or controlled every entity in its territory.

"Agencies, whether created by statute or Executive Order, must of course be free to give reasonable scope to the terms conferring their authority. But they are not free to ignore plain limitations on that authority." *Peters v. Hobby*, 349 U.S. 331, 345 (1955). In *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 136 (1951), this Court further recognized:

> Where an act of an official plainly falls outside of the scope of his authority, he does not make that act legal by doing it and then invoking the doctrine of administrative construction to cover it. . . . The doctrine of administrative construction never has been carried so far as to permit administrative discretion to run riot.

As Justice Black observed in his concurring opinion in *McGrath*, "Officially prepared and proclaimed governmental blacklists possess almost every quality of bills of attainder, the use of which was from the beginning forbidden to both national and state governments." 341 U.S. at 143-44. OFAC grossly exceeded the scope of Executive Orders 12808 and 12810 by adopting its unfounded presumption of government ownership and blacklisting JOP. It cannot excuse its arbitrary action on grounds of expediency, where it blacklisted JOP without even the most minimal investigation of the facts or the law.

Both the district court and the Fifth Circuit correctly concluded that OFAC's initial blocking orders in mid-June 1992 were final administrative actions that deprived petitioners of their property. OFAC therefore had the burden of providing the court with an administrative record to permit the Court to determine what OFAC knew and when it knew it before it blocked the first vessel. OFAC seized the ZETA on June 19, 1992, but its administrative record begins over two weeks later, on July 6, 1992 with Milena's petition for unblocking. The administrative record contains no communication or consultation with the State Department about JOP or the Yugo-

slav economic system, no relevant State Department memorandum, no expert opinions, nor any other authority to warrant OFAC's "presumption" that the Government of Yugoslavia owned or controlled JOP before the blockings began.

After petitioners filed suit in federal court, OFAC's director, R. Richard Newcomb, filed an affidavit on August 3, 1992, stating that he had based his decision to block petitioners vessels on the U.S. Government's "knowledge of the Yugoslav economy." He asserted that he had adopted his "presumption" of government control of Yugoslav businesses "upon review of the historical structure of the Yugoslav economy and the privatization process begun in SFRY in 1989." Mr. Newcomb attached a copy of a September 1990 article by Branko Vukmir, a legal advisor to the United Nations Center on Transnational Corporations, concerning Yugoslavia's law on social capital and privatization of business entities. However, at the preliminary injunction hearing, plaintiffs' expert on Yugoslav law, Stephen B. Ives, Jr., testified without dispute that he had personally furnished copies of the Vukmir article and Yugoslav laws to OFAC in late July 1992, over a month *after* OFAC had seized the vessels and *after* petitioners had filed their administrative request for unblocking.

OFAC likewise had no legal or factual basis on September 18, 1992 to deny petitioners' request for unblocking. OFAC never came forward with any independent evidence or expert opinions to contradict petitioners' experts on Yugoslav law. Indeed, almost the entire administrative record consisted of material that petitioners furnished to OFAC *after* the blocking orders. It is painfully apparent that OFAC responded only with the arguments of its legal counsel to make excuses for OFAC's prior unlawful, arbitrary, and capricious blocking orders.

The Fifth Circuit cannot justify OFAC's blocking orders on grounds that OFAC had to "act quickly" and

could reasonably assume that business enterprises under a recently ended communist regime were government-owned and controlled. In making its hasty presumption, OFAC disregarded the executive orders, which admonish OFAC to consult with the State Department before taking action. Both executive orders provide: "The Secretary of the Treasury, in consultation with the Secretary of State, is hereby authorized to take such actions . . . to carry out the purposes of this order."

Had OFAC bothered to consult other departments of the U.S. Government, even fellow officials within the Department of the Treasury, it would have readily seen that the United States does not consider the Yugoslav Government as owning or controlling all businesses within its borders. As early as 1977, the U.S. Treasury Department had concluded in an antidumping investigation that the Yugoslav economy was not state-controlled. *See Animal Glue and Inedible Gelatin From Yugoslavia*, 42 Fed. Reg. 39, 288 (Dep't Treas. 1977). In 1988, the U.S. Department of Commerce had issued a publication, "*Marketing in Yugoslavia*," OBR 88-09, recognizing that the owner of "socially-owned" industry in Yugoslavia was *not* the state, but rather each company's workers' collective or self-management group. OFAC's unsupported presumption of pervasive government ownership of every enterprise located in Yugoslavia was directly contrary to the Treasury and Commerce Departments' existing pronouncements on Yugoslavia. Even a published federal court decision had already rejected OFAC's post hoc argument that the Yugoslav state ultimately owns and controls all entities in Yugoslavia through the concept of social property. *See Edlow International Co. v. Nuklearna Elektrarna Krsko*, 441 F. Supp. 827 (D.D.C. 1977).

OFAC exceeded the scope of the executive orders and violated due process in adopting its arbitrary presumption and blocking petitioners' vessels without first consulting any department of the U.S. Government, researching Yugoslav law, or investigating the facts about JOP and

petitioners. OFAC cannot rely on the need to act "quickly" as an excuse for its arbitrary, unlawful, and unconstitutional actions.

II. THE FIFTH CIRCUIT VIOLATED THIS COURT'S CONTROLLING JURISPRUDENCE IN RELYING ON OFAC'S POST HOC RATIONALIZATIONS FOR ITS BLOCKING ORDERS AND ADMINISTRATIVE DECISION

The Administrative Procedure Act, 5 U.S.C. § 706(2)(A), authorizes a reviewing court to set aside any agency decision found to be "arbitrary, capricious, and abuse of discretion or not otherwise in accordance with law." Under the arbitrary and capricious standard, the reviewing court must conduct "a thorough, probing, in depth review" and must make a "searching and careful" inquiry to determine whether the agency acted within its authority, adequately considered all the relevant factors, and provided a reasoned basis for its decision." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415-416 (1971). The reviewing court must base its judicial review of the administrative action "on the full administrative record that was before the [administrative officer] . . . at the time he made his decision." 401 U.S. at 420. The administrator cannot introduce self-serving affidavits, the arguments of counsel, or other "post hoc" rationalizations during litigation to justify a prior action that otherwise lacks support in the record when undertaken. 401 U.S. at 419; *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168-69 (1962).

OFAC adopted its arbitrary presumption, took final agency action by blocking petitioners' vessels, and then set about to justify its action through arguments after the fact. In a disturbing display of McCarthyism, OFAC consulted no qualified experts in Yugoslav law before blocking the vessels and blacklisting JOP. Director Newcomb and his staff at OFAC, which has been described as "a minor Treasury Department bureau" (*see American Air-*

ways Charters, Inc. v. Regan, 746 F.2d 865, 876 (D.C. Cir. 1984)), had no specialized training about Yugoslavia's law or economy or about JOP and petitioners to justify their inclusion in its blacklist of "all" companies in Yugoslavia. Indeed, Mr. Newcomb adopted his convenient presumption, because he admittedly had difficulty identifying entities subject to the blocking orders. On July 7, 1992, in an article entitled *U.S. Backs Plan to Clear Way for Bosnian Aid*, the *Wall Street Journal Europe* reported:

> The move by the Treasury in Washington to expand the embargo came because violence and rapid changes have made it difficult to identify ownership of entities subject to the embargo, according to R. Richard Newcomb. . . . "This forces us to regard all companies in Serbia or Montenegro and their foreign subsidiaries as either owned or controlled by the Yugoslav Government," he said.

(Appendix, 66a). Nevertheless, after petitioners filed suit, Mr. Newcomb wore the mantle of an "expert" in Yugoslav law and declared that he based his "presumption" of government ownership upon a review of the historical structure of the Yugoslav economy. The unrefuted testimony of Stephen Ives and the face of the administrative record plainly showed that OFAC obtained its knowledge of Yugoslav law from petitioners' own experts *after* the vessels were seized and *after* administrative and judicial review had already begun.

Mr. Newcomb's declaration and his carefully drafted administrative decision (Appedix, 102a-118a) are nothing more than post hoc rationalizations in defense of his earlier blocking orders that issued on an empty administrative record. In direct conflict with this Court's decisions, cited above, the district court and the Fifth Circuit have adopted OFAC's post hoc arguments and concluded that the agency had acted reasonably in making its presumption of government ownership. This Court should grant the writ petition to prevent this dangerous precedent and remind agencies of their due process obligations.

III. THE FIFTH CIRCUIT ERRED IN REVIEWING AND AFFIRMING OFAC'S INTERPRETATION OF YUGOSLAV AND MONTENEGRIN LAW

The district court further erred in deferring to OFAC's interpretation of Yugoslav and Montenegrin law. Under Rule 44.1 of the Federal Rules of Civil Procedure, the responsibility of interpreting foreign statutes and law belongs to the judge. Both the district court and the Fifth Circuit "deferred" to OFAC's interpretation of foreign law by concluding that its presumption of Yugoslav government ownership of business entities was "reasonable" under the circumstances. Alternatively, the district court and the Fifth Circuit further concluded that OFAC's legal interpretation survived a *de novo* review.

OFAC's interpretation of Yugoslav law warrants no deference, particularly where OFAC did not even know what the Yugoslav law was when it first blocked the vessels. OFAC's legal interpretations in its administrative decision (Appendix, 102a-118a) are yet more post hoc legal arguments. OFAC never undertook any investigation of the applicable law or facts before blocking the vessels. OFAC never produced an opinion from any recognized legal expert stating that the Yugoslav Government had an "interest" in JOP within the meaning of the executive orders.

On the other hand, petitioners adduced the unrefuted opinions of three experts, all of whom declared that JOP is not government-owned or controlled. Stephen B. Ives, Jr., an expert in Yugoslav law, testified that Yugoslavia had abandoned Soviet-style communism by the 1960's and had directed that enterprises owned by society would not be owned by the state. These socially-owned enterprises gave their own workers self-management and control over them. *See* Ives' declaration attached in the appendix at pp. 67a-80a, *infra*. The workers' counsel in each enterprise acted as a board of directors to elect officers and decide how to distribute and invest profits, without any

interference from the Yugoslav Government. In 1988 and 1989, the Socialist Federal Republic of Yugoslavia passed laws on enterprises that permit socially-owned entities to become privately owned. On November 17, 1989, JOP became a mixed enterprise holding both social capital and share capital under this law. Mr. Ives emphasized that socially-owned capital is not state-owned capital. Ives further emphasized that development "funds" from the sale or liquidation of socially-owned enterprises in Yugoslavia do not create a government ownership interest or control in the enterprise. The "fund" mentioned in Branko Vukmir's article came into existence *after* JOP registered as a mixed enterprise on November 17, 1989 and has *no relationship* to JOP. Indeed, JOP's by-laws require that all proceeds received from the issuance and sale of shares are to be put into "restricted purpose funds" *within JOP*. Under Article 19 of JOP's by-laws, JOP's assembly of shareholders solely determines how to manage and dispose of those funds.

A second expert on Yugoslav and Montenegrin law, Zoran Mitic, likewise declared that the concept of "social ownership" of business in Yugoslavia creates self-management and beneficial ownership of the entity and its employees, who control the enterprise entirely and independently of government ownership and control. Mr. Mitic's declaration, which was submitted to the district court, is attached in the appendix at pp. 81a-86a, *infra*. The development "funds" established under Montenegrin law to hold social property after the liquidation or sale of a company and to provide resources to businesses are irrelevant to JOP. Mitic concluded that JOP owns and deals with its assets free of any government interference and that the government has no direct or indirect ownership or control of JOP. Indeed, Articles 11, 24, and 30 of the Law on Ownership and Management Transformation in Montenegro provide that the enterprise may "autonomously select" that the proceeds from the sale of shares can be paid into the company and belong to the enterprise.

Russell O. Prickett, former commercial attache and chief of the economic section of the American Embassy in Belgrade, exhaustively reviewed the structure of JOP and the nature of socially-owned property in Yugoslavia. *See* declarations of Mr. Prickett attached in the appendix at pp. 88a-100a, *infra*. This expert likewise concluded that "*no part* of J.O.P. is the property of the Government of the Federal Republic of Yugoslavia, the Government of Serbia, or the Government of Montenegro, nor of their respective agencies, instrumentalities, or controlled entities." (Emphasis in original). Mr. Prickett further stated that the U.S. Departments of State and Commerce—as well as expert observers inside and outside of Yugoslavia —have long known that the Yugoslav system of social ownership is not government ownership. He had personally briefed the Bush party on this very fact during a vice-presidential visit to Yugoslavia in the mid-1980's. He further unequivocally stated that no assets connected with JOP have ever gone into development funds and that neither Yugoslav nor Montenegrin law gives the government the right to nationalize socially-owned corporations or appoint managing directors in the enterprises.

OFAC's initial blocking orders, which are based on an unfounded "presumption" that the Yugoslav Government owns and controls every entity in its territory, are legally erroneous. This Court owes no deference to OFAC's unwarranted expansion of the executive orders and its erroneous interpretation of Yugoslav law that is contrary to every expert opinion in the record. OFAC had no knowledge of Yugoslav law when it first blocked the vessels. OFAC's carefully drafted administrative decision filed on September 18, 1992 cannot purge the taint of the initial blocking orders. OFAC's "legal" opinions are nothing more than the post hoc arguments of its own director and counsel that are contrary to the unrefuted expert testimony.

This Court has recognized that the Constitution separates and divides the powers of government in order to

"diffus[e] power the better to secure liberty." *Bowsher v. Synar*, 478 U.S. 714, 721 (1986), *quoting Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). This constitutional division seeks "to assure, as nearly as possible, that each branch of government would confine itself to its assigned responsibility." *Immigration & Naturalization Service v. Chadha*, 462 U.S. 919, 951 (1983). By arbitrarily adopting a presumption of Yugoslav government ownership of every entity located in Yugoslavia, by blocking plaintiffs' vessels on an empty administrative record, and by relying on its own post hoc legal interpretations contrary to every expert opinion on judicial review, OFAC has exceeded the scope of its administrative power under the executive orders. The Fifth Circuit's decision, if allowed to stand, endows this "minor Treasury Bureau" with virtually unlimited power to block the property of private businesses and citizens at its whim. The Fifth Circuit's decision does violence to the Constitution's separation of powers and sets a dangerous precedent.

IV. THE FIFTH CIRCUIT ERRED IN REFUSING TO ORDER OFAC TO PROVIDE FOR THE MAINTENANCE OF THE BLOCKED VESSELS

Since OFAC blocked the vessels in June 1992, petitioners have been saddled with the costs of maintaining them to prevent their deterioration. The blocking orders are depriving them of their property without just compensation and are wasting, rather than preserving, their assets in violation of their Fifth Amendment rights. OFAC's orders are tantamount to constructive seizure, arrest, or confiscation of the vessels, which are not free to sail from the ports where they are confined. Petitioners will face criminal penalties if they attempt to move them.

In its notice of July 6, 1992 (Appendix, 57a), OFAC instructed U.S. financial institutions not only to block funds belonging to the Government of Yugoslavia, but

to care for and administer those assets by placing them in blocked interest-bearing accounts. Tangible assets like petitioners' vessels are likewise entitled to protection from waste and deterioration. The vessels are no different from any other form of impounded property in the custody of the United States Government.

Furthermore, the executive orders and OFAC's notices address only persons within the jurisdiction of the United States who have foreign property in *their* hands. OFAC cannot require Milena, a Maltese partnership, to bear the expense of preserving these vessels as long as they remain blocked and constructively seized by OFAC and the Customs Service. By blocking the vessels, preventing them from earning income, and requiring petitioners to pay the costs of their maintenance, OFAC is unlawfully disposing of the assets and violating plaintiffs' Fifth Amendment rights by taking their property without just compensation. Aliens are entitled to the protection of the Fifth Amendment. *Russian Volunteer Fleet v. United States*, 282 U.S. 481, 489 (1931).

This Court has recognized that federal courts have flexibility "to do equity and to mold each decree to the necessities of the particular case." *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944). The Fifth Circuit erred in refusing to grant injunctive and mandamus relief requiring OFAC to protect and preserve the seized vessels by providing custodial keepers for them while they remain blocked.

CONCLUSION

This case arises out of a tragic civil war and the President's sanctions against a foreign government. Petitioners, who are not government-owned or controlled, are the victims of OFAC's arbitrary, capricious, and unlawful blocking orders. Given the increasing efforts of recent administrations to utilize their power under the IEEPA to block the assets of targeted foreign governments and the devastating effect of such blocking orders on the

private property of innocent foreign citizens within the United States, the judiciary must intercede when OFAC disregards due process and takes final agency action without first investigating the facts and the applicable foreign law. OFAC is not a fourth branch of the United States Government that can ignore the United States Constitution and the rule of law in the guise of acting "quickly" to impose economic sanctions, which may remain in place for decades.

The Fifth Circuit's decision in this case contravenes this Court's standards of judicial review of administrative decisions. It promotes arbitrary presumptions and final agency action *without* an administrative record. OFAC's unlawful blocking orders followed by post hoc rationalizations have irreparably injured petitioners and have deprived them of their property without due process. For the foregoing reasons, petitioners ask this Court to grant a writ of certiorari not only to address these important legal issues but also to correct an injustice that is destroying their businesses and reputations.

Respectfully submitted,

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October 19, 1993

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 92-3905

MILENA SHIP MANAGEMENT COMPANY, *et al.*,
Plaintiffs-Appellants,

v.

R. RICHARD NEWCOMB, Director, Office of Foreign Assets Control of the Department of the Treasury, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana

July 21, 1993

Before SMITH, DUHE and WIENER, Circuit Judges.

WIENER, Circuit Judge.

Plaintiff-Appellant Milena Ship Management Company, Ltd. (Milena) appeals the district court's grant of summary judgment in favor of Defendants-Appellees, the Office of Foreign Assets Control (OFAC) of the Department of the United States Treasury, and the United States Customs Service (collectively, the government). Milena challenges the blocking of four or its vessels pursuant to

two Executive Orders and the denial of its petition to unblock the ships. As we find no reversible error in the district court's rulings, we affirm.

I

FACTS AND PROCEEDINGS

The International Emergency Economic Powers Act (IEEPA) [1] grants the President authority to regulate or prohibit international economic transactions in case of a national emergency "which has its source in whole or substantial part outside the United States." [2] Included in this authority is the power to prevent "transactions involving[] any property in which any foreign country or a national thereof has any interest[] by any person, or with respect to any property, subject to the jurisdiction of the United States." [3] Anoher Act of Congress, the United Nations Participation Act (UNPA)[4] authorizes the President to implement measures adopted by the U.N. Security Council pursuant to Article 41 of the U.N. Charter.

Operating under the authority of these two statutes, then President Bush issued two executive orders in reaction to growing civil unrest in former Yugoslavia. Both orders, Executive Orders 12808 and 12810, impose U.N. mandated economic sanctions against the unrecognized Federal Republic of Yugoslavia (FRY or Yugoslavia), consisting of the provinces of Serbia and Montenegro. Executive Order 12808 blocks "all property and interests in property in the name of the Government of Yugoslavia, that hereafter come within the United States, or that are or hereafter come within the possession or control of United States persons." Executive Order 12810

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[1] 50 U.S.C. §§ 1701-1706.

[2] *Id.* § 1701(a).

[3] *Id.* § 1702(a)(1)(B).

[4] 22 U.S.C. § 287(e).

reiterates this restriction and additionally prohibits all imports to the United States from the FRY and all exports from the United States to the FRY.

These Executive Orders also direct the Secretary of the Treasury (Secretary) to promulgate regulations necessary to "block" all property in which the FRY has an interest. On that authority, OFAC immediately issued General Notice No. 1, stating that all entities located or organized in the FRY are presumed to be owned or controlled by the Yugoslavia government. This presumption was based on the history of that government's involvement in business corporations and other enterprises, and its residual interest in those companies. Included in this category was Jugosloanska Oceanska Plovidha (JOP), a commercial shipping company headquartered in Kotor, Montenegro. Under OFAC's order, foreign subsidiaries of Yugoslavian companies are also presumed to be owned or controlled by the Yugoslavian government.

In the course of implementing the Executive Orders, United States Customs agents detained four vessels owned and operated by various JOP subsidiaries—the M/V ZETA and the M/V MOSLAVINA in the port of New Orleans, the M/V DURMITOR in Baltimore, and the M/V MARTINOVIC in Savannah.[5] Milena, which manages and operates all four vessels, denies that JOP is connected with the FRY government. Accordingly, Milena applied to OFAC for an order unblocking JOP's frozen assets. While this application was pending before OFAC, Milena sought declaratory and injunctive relief in the District Court for the Eastern District of Louisiana. That court denied the request, finding that a preliminary injunction would not serve the public interest.

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[5] Ownership of the blocked vessels was transferred to companies in Malta prior to the issuance of the Executive Orders. Thus, the vessels fly the Maltese flag even though the companies in Malta are still owned by JOP.

Subsequently, OFAC denied Milena's petition to unblock the vessel, citing three bases for that decision. First, OFAC cited the U.N. Sanctions Committee ruling that the "continued operation and associated transfers of funds or resources to the owners of four ships controlled and managed by the Milena Ship Management Company of Malta . . . would be in violation of the sanctions established under [Security Council] Resolution 757." OFAC interpreted this language as meaning 'that the release of the vessels would constitute a prohibited transfer of an economic resource of both the Government of [the FRY] and a 'person' within [that country], namely, JOP."

Second, OFAC interpreted the law of the FRY, considering affidavits and articles submitted by various experts. According to the affidavit of Dr. Branko Vukmir, a legal advisor to the U.N., the government of the FRY retains an interest in business enterprises by virtue of the system of "social capital" as opposed to internal (personal) shares. In addition, the government determines and limits the issuance of internal shares and has established a governmental fund to receive the proceeds from the sale of the "social capital." Finally, OFAC concluded that the interest retained by the government under this system justified the conclusion that all Yugoslavian vessels were owned by the government.

Soon afterwards, Milena again filed a motion in the district court, this one being for declaratory and injunctive relief by way of a Motion for Summary Judgment, arguing that OFAC erred in denying Milena's application to have the vesesls unblocked. Milena also sought appointment of a cusotdian to maintain the blocked vessels. Reviewing OFAC's order, the district court agreed with OFAC's interpretation of Yugoslavian law that led OFAC to conclude that JOP is in the fact owned or controlled by the Yugoslavian government. In addition, the district court reviewed and accepted OFAC's factual findings regarding the Yugoslavian government's control over the

economy in general and an enterprise's social capital specially. Consequently, the district court denied the motion for summary judgment. 804 F.Supp. 859.

Ultimately, the district court granted summary judgment in favor of the government, dismissing Milena's claim. Milena timely appealed from this decision.

II

DISCUSSION

A. *Standard of Review*

We review the district court's decision de novo, but review the agency's decision, as did the district court, with the appropriate deference. We will set aside agency action if we find it to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." [6] In reviewing an agency action, we inquire whether the agency acted within its authority, adequately considered all the relevant factors, and provided a reasoned basis for its decision.[7] Furthermore, we give special deference to an agency's interpretation of an order it is charged to administer.[8] Finally, we base ourt review of an administrative action "on the full administrative record that was before the [administrative officer] . . . at the time he made his decision." [9]

B. *OFAC's Presumption*

Milena first challenges OFAC's initial presumption that the Yugoslavian government has a proprietary interest in

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[6] Administrative Procedure Act, 5 U.S.C. § 706(2)(A).

[7] *Citizens to Preserve Overton Park, Inc. v. Volpe.* 401 U.S. 402, 415-16, 91 S.Ct. 814, 823-24, 28 L.Ed.2d 136 (1971).

[8] *United States v. New Orleans Pub. Serv., Inc.*, 553 F.2d 459 (5th Cir. 1977), *cert. granted and vacated on other grounds*, 436 U.S. 942, 98 S.Ct. 2841, 56 L.Ed.2d 783 (1978).

[9] *Overton Park*, 401 U.S. at 420, 91 S.Ct. at 825.

all vessels owned by Yugoslavian companies. Milena stresses that at the time OFAC made this decision it did not possess the Vukmir article, one which plaintiffs themselves later supplied to OFAC. Consequently, Milena insists that OFAC had no basis for the decision and therefore acted arbitrarily and capriciously. The government responds that the presumption does not constitute a final agency action and is therefore not reviewable. According to the government, the only final and reviewable agency action is OFAC's refusal to unblock the vessels.

The district court rejected the government's argument regarding finality in its denial of a preliminary injunction. The court correctly noted that agency action is final when it results in "the imposition of an obligation, the denial of a right, or the fixing of a legal relationship." [10] The court held that the presumption as applied to JOP "clearly imposes obligations (the burdens associated with the blocking), denies rights (the plaintiff's right to freely use and transfer and deal with their property) and fixes a legal relationship (the relationship between the plaintiffs as the targets of a blocking order and the United States as the issuer of the blocking order)." We agree.

Having concluded that the district court was correct in its conclusion that the initial presumption as applied to JOP was a final agency decision, we review the reasonableness of that decision. Here, again, Milena emphasizes that OFAC did not have access to the Vukmir article when it made its decision. Even without the Vukmir article, however, OFAC acted reasonably in issuing the presumption of government ownership. OFAC had to act quickly following the issuance of the Executive Orders; delay would have allowed the assets to leave the United States, thereby thwarting the purpose of the Orders. OFAC assumed, based on its knowledge of governmental

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[10] *United States Dep't of Justice v. Federal Labor Relations Authority*, 727 F.2d 481, 493 (5th Cir. 1984).

involvement in business enterprises under the recently ended communist regime, that there were still vestiges of pervasive government ownership and control in the present system. This presumption is supported by the venerable legal maxim that a known condition is presumed to continue in existence until there is evidence to the contrary. Given the general confusion surrounding the fall of communist regimes in eastern Europe, and the indisputable fact that the existing socialist infrastructures are never dismantled and replaced with capitalism overnight, OFAC's presumption of state ownership and involvement was reasonable.

C. *OFAC's Refusal to Unblock the Vessels*

Milena next challenges OFAC denial of Milena's petition to unblock the vessels. The cornerstone of OFAC's decision was its interpretation of Yugoslavian law, based on the Vukmir article and the current Yugoslavian law on privatization. Milena disputes OFAC's interpretation of that law and insists that OFAC's interpretation is subject to de novo review. The district court applied a deferential standard of review, yet recognized that OFAC's interpretation would also prevail under a de novo review. We again agree with the district court.

Even under the more stringent de novo review, OFAC's interpretation of Yugoslavian law is correct. The Vukmir article describes the Yugoslavian system as based on the concept of "social capital." As such, society has an interest in each business enterprise, albeit the exact nature of that interest is somewhat obscure. Although Milena stresses the difference between a societal interest and a state interest (as in other communist systems), there is little practical difference. As the Vukmir article makes clear, the trend towards privatization has created a dilemma: when a heretofore public business enterprise goes private (i.e., sells private shares), who or what receives the proceeds from the sale of society's interest? Under

the 1990 law, the proceeds are placed in one or more funds controlled by the government.

In the instant case, JOP is not a private company. Therefore, "society"—through its representative, the government—still retains an interest in the enterprise. Should JOP go private, the government would receive a portion of the proceeds. placed in a government controlled fund. In light of the fact that the societal interest reverts to the government, we conclude that he Yugoslavian governmen retains an interest in JOP.

D. *Appointment of a Custodian for the Vessel*

Finally, Milena seeks a writ of mandamus compelling the government to appoint a custodian for the vessels and pay for their maintenance. Although the IEEPA is silent on the appointment of a custodian, its predecessor The Trading With The Enemy Act (TWEA)[11] did provide for the appointment of a custodian. Milena argues that the TWEA provides guidance for interpreting the IEEPA; therefore, because the TWEA provides for appointment of a custodian, Congress intended the same provision to apply under the IEEPA. This bit of legal legerdemain is wholly specious. Exhibit "A" for the proposition that if Congress had wanted to impose an obligation on the government to appoint a custodian, it knew how to say so directly. This is doubly true in the case of IEEPA, wherein Congress incorporated certain TWEA provisions and omitted others. Under these circumstances, Congress's omission of the custodian provision evidences a conscious intent not to assume that obligation.

In addition, were we to find that the government had a duty to appoint a custodian—or had a duty to reimburse Milena for maintenance—the effect would be to shift the costs of the blocking from the sanctioned nation to the United States. This obviously would run counter

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[11] 50 U.S.C. App. § 5.

to the purpose of economic sanctions, which is to exert economic pressure on the offending government, not to mitigate it.

III

CONCLUSION

In this appeal of an administrative agency's decision to block vessels owned by the Yugoslavian government pursuant to two Executive Orders, Milena, as operator of the vessels, challenges the reasonableness of the agency's decision. The agency's initial presumption that the all vessels owned by Yugoslavian companies were subject to blocking was reasonable given the need to act quickly and the general knowledge that, under the communist system, the government had a proprietary interest in all business enterprises. Moreover, in view of this system, in which the government retains an interest in business enterprises in the form of "social capital," the agency's refusal to unblock the vessels was reasonable. Finally, there is no statutory basis for Milena's claim that the government is obligated to appoint a custodian for the vessels. To the contrary, the omission by Congress of such provision when it adopted the IEEPA was clearly deliberate, following as it did on the heels of the predecessor act, the TWEA, which contained such a provision.

For the foregoing reasons, the decision of the district court is

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 92-2535

Section "F"

MILENA SHIP MANAGEMENT CO., *et al.*

versus

R. RICHARD NEWCOMB, *et al.*

JUDGMENT

[Filed Oct. 5, 1992; Date of Entry Oct. 6, 1992]

Considering the Court's record and the joint stipulation on file herein, accordingly;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendants, R. Richard Newcomb, Director of the Office of Foreign Assets Control of the Department of the Treasury, and James Murray, Senior Special Agent of the United States Custom Service, and against plaintiffs, Milena Ship Management Co., Ltd., South Cross Shipping, Ltd., South Adriatic Bulk Shipping, Ltd. and Gulf Eastern Steamship and Chartering Corp., dismissing plaintiffs' suit with costs.

New Orleans, Louisiana, this 5th day of October, 1992.

/s/ Martin L. C. Feldman
MARTIN L. C. FELDMAN
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 92-2535

Section "F"

MILENA SHIP MANAGEMENT COMPANY LTD., *et al.*

versus

R. RICHARD NEWCOMB, *et al.*

ORDER AND REASONS

[Filed Aug. 10, 1992; Date of Entry Aug. 10, 1992]

Before the Court is plaintiffs' motion for a preliminary injunction. Because the injunction would be against the public interest of the United States, the motion is DENIED.

BACKGROUND

In response to the hostilities unfolding in the republics once known as Yugoslavia, and resolutions of the United Nations imposing economic sanctions on the Federal Republic of Yugoslavia (Serbia and Montenegro), President Bush issued two executive orders imposing economic sanctions on that government.[1] In Executive Order 12808, the President blocked

> all property and interests in property in the name of the Government of the Socialist Federal Republic of

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[1] For purposes of the executive orders (and this motion), the "Federal Republic of Yugoslavia" or "Yugoslavia" means the republics of Serbia and Montenegro.

> Yugoslavia or the Government of the Federal Republic of Yugoslavia that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of United States persons.

Executive Order 12810 prohibited all imports to the United States from Yugoslavia and all exports from the United States to Yugoslavia.

On July 6, 1992, the Office of Foreign Assets Control (OFAC) issued a notification that "[a]ll entities located or organized in Serbia and Montenegro, and their foreign subsidiaries, are presumed to be owned or controlled by the Government of Yugoslavia." The OFAC document also mandated that "all assets within U.S. jurisdiction owned or controlled by these entities are to be treated as blocked." The list of blocked Yugoslavian companies in this notice included Jugoslovanska Oceanska Plovidba (JOP).

U.S. Customs agents charged with carrying out this order have detained two vessels, the M/V Zeta and the M/V Moslavina, in the Port of New Orleans. Others, the M/V Kapetan Martinovic and the M/V Durmitor were detained in the Ports of Savannah and Baltimore. Some bank accounts weer also frozen. Plaintiffs here maintain that the blocking order is improper because all these vessels fly the flag of Malta, and all are owned and operated by Maltese companies formed in May 1992. They say that plaintiff South Cross Shipping, Ltd. owns the Zeta and the Durmitor and plaintiff South Adriatic Bulk Shipping, Ltd. owns the Moslavina and the Kapetan Martinovic. All the vessels are managed and operated by plaintiff Milena Ship Management Co. of Malta.

JOP is, however, the parent to the companies that currently, at least nominally, directly own and manage the vessels. JOP has existed for many years. In fact, its present head began years ago as a deck boy with the company. OFAC's blocking order is apparently based on

the government's finding that these companies are "foreign subsidiaries" of JOP so that they, like JOP (a Yugoslavian company) are presumed to be owned or controlled by the Yugoslavian government. Plaintiffs deny that JOP is connected with the Yugoslavian government.

Plaintiffs applied to OFAC for an order unblocking the frozen assets. OFAC has not ruled on that application, and apparently awaits guidance from a United Nations committee before acting on the application. The plaintiffs have filed suit here for declaratory and injunctive relief directed at undoing the blocking order. This motion for a preliminary injunction asks the Court to order the assets unblocked pending a final Court determination of the validity of the administrative freeze order.

I. *Justiciability and Reviewability*

Before the Court can proceed to the merits of plaintiffs' request for a preliminary injunction, the Court must address three threshold issues which implicate the Court's power to hear the plaintiffs' claims at all: (1) Whether the case presents a non-justiciable political question; (2) Whether OFAC has taken a final administrative action that is reviewable under § 706 of the Administrative Procedures Act; and (3) Whether judicial review is barred because the plaintiffs have not exhausted their administrative remedies before OFAC.

A. *Political Question*

Plaintiffs' challenge to OFAC's decision to block its vessels and bank accounts does not present a political question. Thirty years ago the U.S. Supreme Court described the essence of a non-justiciable political question:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it;

> or the impossibility of deciding without an initial policy determination of the kind clearly for non-judicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker v. Carr, 369 U.S. 186, 217, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962); *see also United States v. Munoz-Florez*, 495 U.S. 385, 110 S.Ct. 1964, 1968, 109 L.Ed.2d 384 (1990).

The government maintains that because this case challenges actions which intimately implicate United States foreign policy interests, the Court should decline review. This argument seems to rely on the political question doctrine's articulated policy of safeguarding notions of separation of powers by protecting the executive's Constitutional responsibility for the nation's foreign policy. However, as even the government admits, the fact that judicial review of an OFAC decision would somehow involve United States foreign policy is not determinative. The Supreme Court has long held that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." *Baker*, 369 U.S. at 211. Rather, when deciding whether a political question is involved, a court must closely examine the particular issues presented in the case. *Id.* The analysis is heavily fact-driven. Otherwise, all presidential executive orders could be said to invoke the political question doctrine and would claim immunity from judicial review.

Thus, the Court must carefully consider the extent to which this case involves basic foreign policy decisions entrusted solely to the executive in discharge of its Constitutional role. Executive action that only indirectly also

gives content to some foreign policy issue is not outside the scope of review. Judicial review is prohibited only "[i]n the narrow band of government action where foreign policy interests are direct and substantial." *Spacil v. Crowe*, 489 F.2d 614, 619 (5 Cir. 1974). Thus, "[i]ssues which are not at base sweeping challenges to the Executive's foreign policy typically are adjudicated by the courts because they do not involve judicial usurpation of the Executive's constitutional powers to manage foreign affairs." *Ramirez de Arellano v. Weinberger*, 745 P.2d 1500, 1512 (D.C. Cir. 1984) (en banc), *vacated on other grounds*, 471 U.S. 1113, 105 S.Ct. 2353, 86 L.Ed. 2d 255 (1985).

In *Ramirez*, the court held that no political question was presented because plaintiffs were not:

> seek[ing] to adjudicate the lawfulness of the United States military presence abroad. Instead, they [were] seek[ing] adjudication of the narrow issue whether the United States defendants [could] run military exercises throughout the plaintiff's private pastures when their land [had] not been lawfully expropriated. They [did] not challenge the United States military presence in Honduras or in Central America, nor [did] they object to United States sponsorship of a Regional Military Training Center in Honduras. Plaintiffs' claim . . . [was] narrowly focused on the lawfulness of the United States defendants' occupation and use of the plaintiffs' cattle ranch.

Id. The court then reasoned that the case was a "paradigmatic" one for judicial resolution because "federal courts historically have resolved disputes over land, even when the United States military is occupying the property at issue." *Id.* The distinction between direct as opposed to indirect involvement of foreign policy must be kept in mind.

Similarly, the plaintiffs here have not advanced a comprehensive challenge to the President's strategy or authority regarding how this nation and others confront the present Yugoslavian problem. Plaintiffs have not challenged the President's decision to declare a national emergency. Nor have they questioned the validity of the executive orders imposing economic sanctions against Yugoslavia, including the blocking of government controlled assets. If plaintiffs had asked for court review of these kinds of executive decisions, it is arguable that this Court ought not take review. *See Beacon Products Corp. v. Reagan*, 633 F. Supp. 1191, 1194-95 (D. Mass. 1986), *aff'd*, 814 F.2d 1 (1 Cir. 1987) (challenge to President's declaration of national emergency because of his determination that Nicaragua posed an unusual and extraordinary threat to national security was non-justiciable political question.).

This case is an administrative law dispute. Plaintiffs have requested judicial review of agency action, OFAC, taken pursuant to an unchallenged executive order. Review of administrative decisions is clearly a time-tested judicial function; in fact, agency actions are presumptively reviewable by federal courts. *See* 5 U.S.C. § 701(a). Indeed, many courts have, without expressly addressing the political question doctrine, reviewed OFAC decisions on unblocking petitions. *See Tagle v. Regan*, 643 F.2d 1058 (5 Cir. 1981) (applying Cuban Assets Control Regulations); *Real v. Simon*, 510 F.2d 557 (5 Cir. 1975) (applying Trading With the Enemy Act); *Cernuda v. Heavy*, 720 F. Supp. 1544 (S.D. Fla. 1989) (applying Trading With the Enemy Act and Cuban Assets Control Regulations); *Behring International, Inc. v. Miller*, 504 F. Supp. (D.N.J. 1980) (applying arbitrary and capricious review to OFAC decision that Iran had an interest in assets blocked according to executive orders and regulations).

The Court holds that the OFAC's decision in this case to block plaintiffs' vessels does not so directly implicate U.S. foreign policy that it is insulated from review. The executive orders are clear. Judicial review of administrative decisions implementing these orders does not hamper the executive's conduct of foreign policy by injecting unacceptable sweeping challenges to foreign policy choices. *See Ramirez, supra.* Instead, the quite limited "arbitrary and capricious" review authorized by the Act merely provides a mechanism to ensure even-handed application of administration policy. This case is justiciable.

B. *Finality and Exhaustion of Remedies*

Plaintiffs' claims are all based on judicial review of an agency's action.[2] But, one must ask, should the agency

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[2] The Administrative Procedures Act provides for judicial review of the challenged OFAC actions. Section 701(a)'s presumption of reviewability "can be rebutted only by a clear showing that judicial review would be inappropriate." *See Tran Qui Than v. Regan*, 658 F.2d 1296, 1301 (9 Cir. 1981), *cert. denied*, 459 U.S. 1069, 103 S.Ct. 487, 74 L.Ed.2d 630 (1982). The government has pointed to nothing (and the Court finds nothing) in either the text of the International Emergency Economic Powers Act, 50 U.S.C. § 1701, or legislative history that provides "'clear and convincing evidence' of a . . . legislative intent . . . [to] restrict access to judicial review." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967). Further, the "committed to agency discretion" exception is quite narrow and applies only when "statutes are drawn in such broad terms that in a given case there is no law to apply." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971). Neither the IEEPA nor the executive orders implicate this exception to § 701(a). Thus, OFAC's initial decision to block the vessels is not exempted from this Court's statutory power of review. *See Tran Qui Then, supra* (district court had power, under Administrative Procedures Act, to review OFAC's decision to refuse to unblock assets blocked pursuant to executive orders and regulations advanced under Trading With the Enemy Act).

action be final? The Act and the case literature interpreting it raise two procedural hurdles that one must clear before judicial review of agency action may take place. First, if the agency action at issue is not otherwise made reviewable by statute, § 704 of Act limits judicial review to "final agency action." *See* 5 U.S.C. § 704; *Lujan v. National Wildlife Federation*, 497 U.S. 871, 110 S.Ct. 3177, 3191, 111 L.Ed.2d 695 (1990). This requirement admits only severely limited exceptions. *See Geyen v. Marsh*, 775 F.2d 1303, 1308 n. 6 (5 Cir. 1985). Federal courts "intervene in the administration of the laws when, and only to the extent that, a specific 'final agency action' has an actual or immediately threatened effect." *Lujan*, 110 S.Ct. at 3191. Second, it has been said in general that one seeking judicial review of an agency action must exhaust available administrative remedies before going to court. *See Sweet Life v. Dole*, 876 F.2d 402, 407 (5 Cir. 1989).

Although these two criteria are closely related, the Fifth Circuit has distinguished between them. Agency action is final when it results in "the imposition of an obligation, the denial of a right, or the fixing of a legal relationship." *United State Department of Justice v. Federal Labor Relations Authority*, 727 F.2d 481, 493 (5 Cir. 1984). And according to § 704, if an action is otherwise final, it is final "whether or not there has been presented or determined an application . . . for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority." 5 U.S.C. § 704. Thus, the Fifth Circuit instructs this Court that agency action is final according to the prevailing definition is a " 'final agency action,' regardless of [a] right to seek administrative review." *Geyen, supra.*

In this circuit, therefore, the requirements of finality and exhaustion of remedies are separate, although closely

related. *Id.* Exhaustion defines when an action may be reviewed and finality determines what type of action may be reviewed. *Id.* Hence, there can be finality without exhaustion. *Id.*

In this case, plaintiffs' claims revolve around two agency actions. Plaintiffs seek review of OFAC's decision to "treat[] as blocked" all entities that were "located or organized in Serbia or Montenegro, and their foreign subsidiaries" under OFAC's determination that such entities were "presumed to be owned or controlled by the government of Yugoslavia." Also, plaintiffs characterize as final agency action OFAC's decision to defer ruling on plaintiffs' request to unblock their vessels until OFAC can obtain guidance from a special United Nations committee on the status of the ships.

The first action is final but the second is not. OFAC's decision to apply the presumption to JOP and its foreign subsidiaries and to block all its assets in the United States clearly imposes obligations (the burdens associated with the blocking), denies rights (the plaintiff's rights to freely use and transfer and deal with their property) and fixes a legal relationship (the relationship between the plaintiffs as the targets of a blocking order and the United States as the issuer of the blocking order). Thus, the decision is final for purposes of the Administrative Procedures Act. *See Federal Labor Relations, supra.* However, OFAC's decision to defer a ruling until a latter time is, by its terms, not yet final. Simply put, OFAC has not yet decided anything about unblocking.

The procedure by which one can petition OFAC for a license or an unblocking is properly characterized as an avenue of administrative review of an OFAC blocking order. 31 C.F.R. § 500.802 provides that "[a]ny interested person desiring the unblocking of accounts or other property on the ground that no person having an interest in the property is a designated national may file . . . an

application" for a license or for a decision unblocking the property. This regulation clearly contemplates agency review of a previous blocking order in light of evidence that the subject company is not foreign-controlled. The process is separate in its construct. It creates another avenue within OFAC for one subject to a blocking order to obtain agency review. Thus, under the general rule, this remedy must be exhausted before judicial review may be obtained. *See Sweet Life, supra.*

In sum, the Court is faced with the following setting for purposes of judicial review under the Act. OFAC, by imposing a blocking order on the assets of JOP and is foreign subsidiaries, has taken a final agency action as required by § 704. The plaintiffs have pursued their administrative remedies by filing an application for an unblocking order with the OFAC. However, the plaintiffs have filed a claim for review of the unblocking order in this Court before the OFAC administrative review process has run its course.

Thus, the Court's focus narrows to the question whether plaintiffs may have judicial review despite the fact that they have not yet exhausted their administrative remedies before OFAC.

The Fifth Circuit has noted at least two policies supporting the exhaustion of remedies requirement. The exhaustion requirement is important to ensure that courts do not prematurely interrupt orderly agency process, and prevent the agency from "utiliz[ing] its discretion, apply-[ing] its expertise, correct[ing] its own errors, and han-dl[ing] its own business expeditiously." *Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. National Association of Securities Dealers, Inc.*, 616 F.2d 1363, 1370 (5 Cir. 1980); *see also Sweet Life, supra.* Further, exhaustion is justified by judicial economy concerns because "administrative review might obviate the need for judicial review." *Id.* (quoting *Hodges v. Callaway*, 499 F.2d 417, 423 (5 Cir. 1974)).

But, importantly, the exhaustion requirement is not absolute. Like most general rules, it has its exceptions. One may obtain immediate judicial review (1) when the administrative remedy is inadequate; or (2) when the one seeking review is likely to suffer irreparable harm in the absence of immediate review. *See Sweet Life, supra.*

Here, plaintiffs urge that if they are denied immediate judicial review and, instead, are required to wait for OFAC to decide their application (presumably after the UN committee gives a decision), they will suffer irreparable harm. The Court agrees. It is true, as the government argues, that "[t]he possibility that adequate compensatory or other relief will be available at a later date, in the ordinary course of litigation, weigh[]s heavily against a claim of irreparable harm." *Morgan v. Fletcher,* 518 F.2d 236, 240 (5 Cir. 1975) (quoting *Virginia Petroleum Joggers Association v. Federal Power Commission,* 259 F.2d 921, 925 (D.C. Cir. 1958)). But, obviously, "[t]he absence of an available remedy by which the movant can later recover monetary damages . . . may also be sufficient to show irreparable injury." *Enterprise International Inc. v. Corporacion Estatal Petrolera Ecuatoriana,* 762 F.2d 464, 473.

The Court agrees that most, if not all, the plaintiffs' claims of irreparable harm involve monetary damages (loss of business, the expenses of maintaining the vessels while blocked, and the like). However, whether plaintiff could ever obtain monetary relief against either Mr. Newcomb (the OFAC Director), OFAC itself, or the United States is highly problemmatical. *See Tran Oui Than,* 658 F.2d at 1304; *Miranda v. Secretary of the Treasury,* 766 F.2d 1, 5 (1 Cir. 1985).

Thus, if the OFAC blocking order against the vessels were eventually found to have been unlawful, the plaintiffs arguably face the serious, if not insurmountable, obstacle to the recovery of any damages they have sus-

tained. Although only monetary, the damages plaintiffs will continue to suffer while the vessels are blocked could be said to be irreparable. The Court, therefore, may review OFAC's decision to block plaintiffs' vessels despite the fact that plaintiffs have not exhausted all their administrative remedies in OFAC.

II. *The Injunction*

The basic standards governing a court's consideration of a motion for a preliminary injunction are familiar, and they bind this Court. When considering an application for a prelimniary injunction, a court must determine: (1) whether the movant will suffer irreparable injury unless the injunction issues; (2) whether there is a substantial likelihood that the applicant will prevail on the merits; (3) whether the threatened injury to the movant outweighs whatever harm the injunction would cause opposing parties; and (4) whether an injunction is in the public interest. *See, e.g., Allied Marketing Group, Inc. v. CDL Marketing, Inc.*, 878 F.2d 806, 809 (5 Cir. 1989); *Apple Barrel Productions, Inc. v. Beard*, 730 F.2d 384, 386 (5 Cir. 1984).

In applying these standards, a court "must remember that a preliminary injunction is an extraordinary and drastic remedy." *Canal Authority v. Callaway*, 489 F.2d 567, 573 (5 Cir. 1974). The movant bears a patently heavy burden of proof, *see Hardin v. Houston Chronicle Publishing Co.*, 572 F.2d 1106, 1107 (5 Cir. 1978), and if it fails to carry the burden on any one of the four criteria, the court may not grant the injunction. *See Enterprise International*, 762 F.2d a 472; *see also Allied Marketing, supra.*

Moreover, plaintiffs ask for a mandatory preliminary injunction. That must be emphasized; they have asked the Court to grant functionally all, if not all, the relief they ultimately seek. "Mandatory preliminary relief, which goes well beyond simply maintaining the status quo

pendente lite, is particularly disfavored, and should not be issued unless the facts and law clearly favor the nonmoving party." *Martinez v. Matthews*, 544 F.2d 1233, 1243 (5 Cir. 1976) (citations omitted). These principles inform the Court's decision today.

A. *The Merits*

Plaintiffs strenuously assert that it was arbitrary and capricious for OFAC to decide that, when issuing its blocking orders, it would presume that all entities organized under Serbian or Montenegrin law and their foreign subsidiaries are controlled by the Yugoslavian government. OFAC blocked JOP's assets because of this presumption.

Section 706 of the Act provides, in part, that a reviewing court shall:

> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . .

In the administrative process context, the Court must accord the agency's decision a "presumption of regularity," *Overton Park*, 401 U.S. at 415, and the Court cannot substitute its judgment for that of the agency.[3] *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983).

Thus, the Court's role in reviewing an agency decision consists of deciding "whether the decision was based on a consideration of the relevant factors and whether there

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[3] Errors of law are reviewed *de novo*, but if error is found the matter is remanded to the agency for further consideration. *Pollgreen v. Morris*, 770 F.2d 1536, 1543 (11 Cir. 1985). Whether an error of law was committed has not been established by plaintiffs.

has been a clear error in judgment." *Overton Park, supra*, at 416. An administrative rule is arbitrary and capricious when:

> the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Manufacturers Association, 463 U.S. at 43.

Arguably, the OFAC presumption was mistaken. But whether it was an arbitrary mistake, or a capricious mistake (given the confused and uncertain state of Yugoslavian law) is unclear. OFAC says it relied on a paper written by Dr. Branko Vukmir, a legal advisor to the United Nations, to invoke the presumption. The paper, titled "Privatization in Yugoslavia", explains the effects of the Yugoslavian economic reforms on corporations.

Plaintiffs counter that Vukmir writes that under the Yugoslavian Constituiton of 1974, the government could not own property, and businesses were run by workers' councils. In fact, Vukmir concludes that "Yugoslavia enterprises were not considered as state enterprises and their property was not considered as state-owned property." Vukmir says that there simply was no such thing as "ownership" of businesses by anyone in Yugoslavia before 1989.

The government counters that OFAC considered Vukmir's characterization of the 1989-90 privatization reforms and concluded that it was reasonable to assume that the government nevertheless retained control of supposedly private businesses. This is because, as Vukmir notes, when a privatizing firm sells shares to private individuals, the proceeds of the sale are placed in a fund

that is still controlled by the government of the republic in which the company is located.

The distinction between privatization and "social property" in Yugoslavia remains undefined on this record. No evidence establishes the absence of some governmental presence in the concept of social property. And JOP's head, Captain Samardzic, was undeniably the foreign minister of Montenegro until he resigned July 31, 1992 to go to Malta.

B. *The Public Interest*

Of central importance to the Court, which overrides all other considerations, is the question whether a preliminary injunction in this case would serve the public interest. The public interest overarches all else because of the world backdrop against which OFAC's action was taken. In examining the impact a similar order would have on the public interest, this Court in another case noted the reasoning of the District of Columbia Circuit:

> While it is clear as a general proposition that judicial relief may be available for unlawful actions committed by the Executive Branch, even in areas touching on foreign relations, . . . this principle does not allow the court blindly to issue injunctive relief without due consideration for the doctrine of separation of powers.

Medvid By Jeziersky v. New Orleans Police Department, 621 F. Supp. 503, 508 (E.D. La. 1985) (quoting *Ukrainian-American Bar Association, Inc. v. Schultz*, No. 85-3487, slip op. at 6 (D.C. Cir. November 5, 1985)).

The line between the political question doctrine and considerations regarding the relief sought and the public interest is hazy indeed. Although the Court has concluded that OFAC's decision in this case does not so directly implicate the President's power to conduct foreign policy so as to make judicial review inappropriate, the

Court must still take into account the effect a preliminary injunction would have on the executive's ability to conduct foreign affairs, on the Congressional policy behind the authorization of blocking orders, and on this country's obligations with respect to the United Nations. The Court holds that graning a preliminary injunction unblocking the plaintiffs' vessels and bank accounts before a full hearing on the merits of OFAC's blocking decisions would risk impermissible interference with Executive and Congressional decisions regarding blocking orders in general, and the specific blocking orders at issue in this case.

The Supreme Court has recognized that Congress authorized presidential blocking orders so that in times of crisis the President could marshall control of foreign assets. *See Dames & Moore v. Regan*, 453 U.S. 654, 673, 101 S.Ct. 2972, 69 L.Ed.2d 918 (1981); *Propper v. Clark*, 337 U.S. 472, 493, 69 S.Ct. 1333, 93 L.Ed. 1480 (1949). Blocking orders

> permit the President to maintain the foreign assets at his disposal for use in negotiating the resolution of a declared national emergency. The frozen assets serve as a "bargaining chip" to be used by the President when dealing with a hostile country.

Dames & Moore, 453 U.S. at 673.

In this case, a preliminary injunction will have the effect of a permanent injunction. Once the vessels and bank accounts are preliminarily unblocked, these assets will be lost forever to the President's control. A bond merely assures recovery of their value; it does not assure the President's control. Surely, if the bank accounts and vessels are somehow influenced by the Yugoslavian government, an issue on which the evidence has been inconclusive, temporary unblocking would provide an opportunity for the principals to remove the property forever from the jurisdiction of the United States. The President will have permanently lost an important bargaining posi-

tion in the negotiations with Yugoslavia and could be viewed in the world community as having reduced in importance the U.N. sanctions that have been adopted in the several resolutions. And plaintiffs have failed to prove that the seized properties are not subject to pervasive governmental control.

The Court is extraordinarily reluctant to deprive the President the leverage he has by virtue of U.S. laws and U.N. action, even temporarily. A hearing on a preliminary injunction by its nature does not allow the Court the means to fully develop a record. Everyone recognizes the characteristic haste in which these matters arise. In the preliminary injunction setting, any decision on the merits of the case is usually only a rough estimation of whether the one seeking extraordinary relief is likely to eventually prove his case. But the ultimate merits of a case remain subject to change as the contours of the parties' positions take shape through the trial process. In sum, a Court's decision on a preliminary injunction request that a party is likely to succeed on the merits is, obviously, subject to change as the record is fully developed. And what the laws of the region were at one time or another remains enshrouded in dispute.

In this case, plaintiffs may, in the end, prove that the Yugoslavian government has no interest in the blocked vessels and bank accounts. Indeed, it may even be likely that they will do so. However, the plaintiffs' evidence is not so overwhelming that the Court can rule conclusively; that is not the Court's role in this setting. The government could well eventually prove that the Yugoslavian government had control of the vessels and bank accounts. At best, the present record can give plaintiffs little comfort.

This uncertainty underscores the risk in this case that a preliminary injunction would interfere with the President's ability to deal effectively with the Yugoslavian prob-

lem. If it is ultimately proved that the Yugoslavian government controlled the blocked assets, the Court's decision to grant preliminary relief will have done an obvious disservice. One far more serious than the wrongful seizure that has been argued here.

Separation of powers dictates that some judicial review of the OFAC's decisions in this case be available. But this sacred constitutional principle likewise animates the Court's reluctance to interfere with OFAC's decisions before a full hearing on the merits, because of the real risk that early (and consequently, somewhat uninformed) interference could limit the President's diplomatic options.

Accordingly, plaintiffs' motion for a preliminary injunction is DENIED.

New Orleans, Louisiana, August 10, 1992.

/s/ Martin L. C. Feldman
MARTIN L. C. FELDMAN
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 92-2535

Section "F"

MILENA SHIP MANAGEMENT COMPANY, LTD., *et al.*

versus

R. RICHARD NEWCOMB, *et al.*

ORDER AND REASONS

[Filed Oct. 20, 1992; Date of Entry Sept. 24, 1992;
Corrected Copy Entered Oct. 20, 1992]

Before this Court is the motion of Milena Ship Management Company, Ltd., and the three Maltese shipping companies which it represents, plaintiffs in this action, for the Court to order the defendants to appoint a provisional custodian to maintain and administer four vessels owned or operated by the plaintiffs which are the subject of a blocking order issued pursuant to the International Emergency Economic Procedures Act.[1] For the reasons that follow, the motion is denied. Although the facts have been recited in a prior opinion denying the plaintiff's motion for a preliminary injunction, they will be repeated to keep the issues in perspective.

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[1] The other named plaintiffs which, at least nominally, own the blocked vessels are South Cross Shipping Ltd., South Adriatic Bulk Shipping Limited, and Gulf & Eastern Steamship and Chartering Corp.

BACKGROUND

Against the background of hostilities occurring in the strife torn republic once known as Yugoslavia and the resolutions of the United Nations imposing economic sanctions on the Federal Republic of Yugoslavia (Serbia and Montenegro), President Bush issued two executive orders imposing economic sanctions on that government. In Executive Order 12808, the President blocked

> all property and interests in property in the name of the Government of the Socialist Federal Republic of Yugoslavia or the Government of the Federal Republic of Yugoslavia that are in the United States, that, hereafter come within the United States, or that are or hereafter come within the possession or control of United States persons.

Executive Order 12810 prohibited all imports to the United States from Yugoslavia and all exports from the United States to Yugoslavia.

In early July, the Office of Foreign Assets Control (OFAC) issued a notification that "[a]ll entities located or organized in Serbia and Montenegro, and their foreign subsidiaries, are presumed to be owned or controlled by the Government of Yugoslavia." This same document announced that "all assets within U.S. jurisdiction owned or controlled by these entities are to be treated as blocked." The list of blocked Yugoslavian companies in this notice included Jugoslovanska Oceanska Plovidba (JOP).

Pursuant to this order, the U.S. Customs Service has blocked vessels in the Port of New Orleans (the M/V Zeta and the M/V Moslavina) and the Ports of Savannah and Baltimore (the M/V Kapetan Martinovic and the M/V Durmitor) as well as blocking some bank accounts relating to JOP.

The plaintiffs maintain that the blocking order is improper because all these vessels fly the flag of Malta, and all are owned and operated by Maltese companies (recently formed in May 1992). They say that plaintiff South Cross Shipping, Ltd. owns the Zeta and the Durmitor and plaintiff South Adriatic Bulk Shipping, Ltd. owns the Moslavina and the Kapetan Martinovic. All of the vessels are managed and operated by the plaintiff Milena Ship Management Co. of Malta.

JOP, an old and established company, is, however, the parent to each of the recently formed Maltese companies that currently, at least nominally, own and manage the vessels. OFAC's blocking order is based upon its conclusion that the Maltese companies are "foreign subsidiaries" of JOP so that they, like JOP (a Yugoslavian company) are presumed to be owned or controlled by the Yugoslavian government. The plaintiffs deny this claim, although the head of JOP, until a short time ago, was also the foreign minister of Montenegro.

The plaintiffs have previously sought a preliminary injunction asking this Court to unblock the assets pending a final determination of the validity of the administrative freeze order. This Court denied that motion finding that the plaintiffs had failed to carry their burden of proof on the issue of substantial likelihood of success on the merits, and that the requested preliminary injunction did not serve the public interest.

I.

The plaintiffs now move for this Court to order the defendants to appoint a provisional custodian to be responsible for the maintenance and care of the four blocked vessels for the duration of this case. In deciding this motion, this Court is mindful of and constrained by the fact that the defendants are officials of the United States government. As a result, the proper procedural model for

deciding this motion is the Mandamus Act, 28 U.S.C. § 1361. For the plaintiffs to succeed on their motion they must prove that (1) their claim for relief is clear and certain; (2) that the defendants have a duty which is ministerial and so plainly prescribed as to be free from doubt; and (3) no other adequate remedy is available. *Azurin* v. *Von Raab,* 803 F.2d 993, 995 (9 Cir 1986). *See also, Sheehan* v. *Army and Air Force Exchange Service,* 619 F.2d 1132, 1141 (5 Cir 1980); *Winningham* v. *HUD,* 512 F.2d 617, 620 (5 Cir 1975). The plaintiffs have failed to meet this test because no duty exists to provide custodial care for blocked assets under the IEEPA, certainly not one so plainly prescribed as to be free from doubt.

A.

The plaintiffs make two arguments in support of their motion to order the appointment of a provisional custodian. First, they argue that because they have been "completely divested of all control over the movement, operation and management of these vessels, [the blocking] is tantamount to a constructive seizure of these vessels." As such, the plaintiffs argue, the defendants are responsible for the care and maintenance of the vessels. This Court disagrees with both the plaintiffs, characterization of the blocking action and the conclusion that the plaintiffs draw from it. The plaintiffs have not been completely divested of all control over these vessels. In fact, the defendants have indicated a willingness

> to grant plaintiffs licenses to maintain their vessels using funds from blocked accounts, to grant licenses for the sale of the vessels with proceeds to be placed in a blocked account, or to grant the plaintiffs licenses to operate under bare boat charters with the proceeds to be placed in blocked accounts.[2]

[2] Defendants' Memorandum in Opposition to Plaintiffs' Motion to Appoint Provisional Custodian, note 3 p. 5.

That the plaintiffs must proceed with the permission of the defendants merely suggests that the plaintiffs have a more heavily regulated control over their ships under emergency circumstances, but certainly have not been completely divested of control.

Plaintiffs' novel concept of a "constructive seizure" can hardly be drawn from the fact that the Customs Service has refused to permit the vessels to clear for foreign ports. Had these vessels been actually seized by U.S. marshals under the Court's jurisdiction as part of *in rem* proceedings in admiralty, then the United States would have an interim duty of care, but that is not this case. That the blocking order impinges upon how the plaintiffs would choose to utilize their vessels does not elevate the government's administrative act to the status of a seizure, constructive or otherwise. The Customs Service assumes no duty of maintenance or care by refusing to clear these vessels for foreign ports. And no impediments have been placed in the way of the plaintiffs' care of these vessels.

B.

The plaintiffs' second argument is one of statutory construction. The Executive Order at issue in this case was issued under the International Emergency Economic Procedures Act, a statute which authorizes the President to regulate international economic transactions and foreign assets in the United States during times of national emergency. 50 U.S.C. § 1701 et seq. It is the plaintiffs' assertion that the IEEPA can only be read in conjunction with its ancestor, the Trading with the Enemy Act (TWEA), which authorizes similar sanctions but is restricted to times of war. 50 U.S.C. § 1 et seq. The TWEA is superficially helpful to the plaintiffs because, unlike the IEEPA, it contains a specific provision for an "Alien Property Custodian" authorized to receive all money and property belonging to the enemy, and to hold, administer and account for these assets "under the direc-

tion of the President." 50 U.S.C. App. § 6. Because the IEEPA contains no such provision, the plaintiffs suggest that this Court should read the custodial provision of the TWEA normatively into the silence of the IEEPA. While such statutory gymnastics would be convenient for the plaintiffs, this Court should not ignore the plain text of the IEEPA.

Discovering congressional intent in a particular statute can result in a free-floating analysis if the Court allows itself to become untethered from the clarity of the statute itself. Of first importance, however, is the need to "examine the explicit statutory language and the structure and purpose of the statute." *Ingersoll-Rand Co.* v. *McClendon*, 498 U.S. 133, ——, 111 S.Ct. 478, 482, 112 L.Ed.2d 474 (1990). Here, the statute is silent as to any custodial obligations for blocked vessels on the part of the United States. That is the stark textual contrast of TWEA and IEEPA. To go beyond the IEEPA and extrapolate such obligations from the TWEA would be judicial excess. Congress is presumed to have been aware of the differences between the two acts because so much of the later IEEPA is identical to its predecessor. That it chose not to impose the custodial duties under the IEEPA is a choice that must be respected by this Court. It would certainly be too much for this Court to presume that Congress intended for the courts to read the silence of the IEEPA as really meaning "for custodial duties for blocked assets see the Trading with the Enemy Act."

II.

If a custodial duty cannot be implied under the IEEPA from the existence of such a duty under the TWEA, nor can it be implied from the fact, as plaintiffs suggest, that OFAC directed financial institutions to place blocked funds of Yugoslavia in interest bearing accounts. The plaintiffs interpret this as an order to the banking institutions "to see that these funds grow instead of diminish"

and conclude that the owners of blocked tangible assets are due no less care than those of intangible assets. There is, however, a marked difference between directing a bank to place funds in an interest bearing account and requiring the government to maintain a blocked ship. As the defendants persuasively argue, placing funds in interest bearing accounts does not commit the government to management or maintenance duties, as would be the case with taking physical custody of an asset.

The plaintiffs' final plea is that policy and equity urge this Court to order the defendant to appoint a provisional custodian. The plaintiffs misunderstand the purpose of the IEEPA and orders issued under it. Plaintiffs would shift the cost of the blocking order to the United States. That would weaken the effect of the IEEPA. The very purpose of Executive Order 12808 is to speak to U.N. sanctions and to impose economic punishment on the government that now calls itself Yugoslavia because of human rights violations in the region that have met with unqualified condemnation in the international community.

In the end, this Court cannot, even as a safeguard against the speculation that plaintiffs might succeed on the merits, order the government to care for the blocked vessels. No statutory or other duty is imposed on the defendants to provide a a custodian, and this Court is not the place to create one. The motion is denied.

New Orleans, Louisiana, September 23, 1992.

/s/ Martin L. C. Feldman
MARTIN L. C. FELDMAN
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 92-2535

Section "F"

MILENA SHIP MANAGEMENT COMPANY, LTD., *et al.*

versus

R. RICHARD NEWCOMB, *et al.*

ORDER AND REASONS

[Filed Oct. 20, 1992; Date of Entry Sept. 29, 1992;
Corrected Copy Entered Oct. 20, 1992]

The plaintiffs move for summary judgment in the form of declaratory relief and a permanent injunction in an action to review a governmental administrative order blocking the plaintiffs' ships as assets controlled or owned by the Yugoslavian government. For the reasons that follow, the motion is DENIED. The facts have twice been stated in other written opinions, and need not be repeated here.

I.

Federal Rule of Civil Procedure 56 instructs that summary judgment is proper if the record discloses no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No genuine issue of fact exists if the record, taken as a whole could not lead a rational trier of fact to find for the non-moving party. *See Matsushita Elec. Indus. Co.* v. *Zenith Radio.*,

475 U.S. 574, 587 (1986). A genuine issue of fact exists only "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The mere argued existence of a factual dispute does not defeat an otherwise properly supported motion. *See id.* Therefore, "if the evidence is merely colorable, or is not significantly probative," then summary judgment is appropriate. *Id* at 249-50 (citations omitted).

A.

The standards for summary judgment are not the only ones having an impact on this case.[1] The plaintiffs in this action are challenging the decisions of an administrative agency of the United States government. This Court's scope of review under the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* of an administrative agency's decision is very narrow indeed. That decision, in fact, must be sustained unless the Court finds that it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). *See Department of Banking and Consumer Finance* v. *Clarke*, 809 F.2d 266, 271 (5 Cir. 1987), *citing Camp* v. *Pitts*, 411 U.S. 138 (1973). Inherent in the standard is a high degree of deference to the agency's decision, bordering on a presumption that the action taken is valid. *See Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 415, 91 S.Ct. 814, 823, 28 L.Ed.2d 136 (1971); *American*

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[1] The plaintiffs' claim that the determination of what is a foreign entity is governed by the Foreign Sovereign Immunities Act, 28 U.S.C. 1602, is incorrect. OPAC's involvement in this event is based not on the FSIA but rather on the International Economic Emergency Procedures Act. The FSIA is intended to govern claims of immunity by foreign states when sued in federal court. It is not applicable to actions authorized by IEEPA. *See Chas. T. Main Intern., Inc.*, v. *Khuzestan Water & Power Authority*, 651 F.2d 800 (1 Cir. 1981) (FSIA not intended to eradicate executive branch flexibility under IEEPA in an international crisis).

Financial Services v. *F.T.C.*, 767 F.2d 957, 985 (D.C. Cir. 1985). When reviewing an agency's decision, the Court may neither substitute its judgment for that of the agency, *Overton Park*, 410 U.S. at 416, nor "weigh alternatives available to an agency and then determine which is more reasonable[.]" *Soler* v. *G. & U., Inc.*, 833 F.2d 1104, 1107 (2d Cir. 1987) *cert. denied*, 488 U.S. 832 (1988). In fact, even if this Court disagrees with the agency's decision, the judicial role is relegated to affirming the agency's decision so long as a rational basis is presented for the decision reached. *See United Neighbors Civic Ass'n of Jamaica* v. *Pierce*, 563 F. Supp. 200, 205 *citing Bowman Transportation, Inc.* v. *Arkansas-Best Freight Systems, Inc.*, 419 U.S. 281, 290, 95 S.Ct. 438, 444, 42 L.Ed.2d 447 (1974). And so, in this setting, summary judgment criteria are informed by these clear instructions regarding review of agency actions.

The Fifth Circuit has held that the determination as to whether an agency's factual findings are arbitrary and capricious "must be made on the basis of the administrative record." *Dep't of Banking and Consumer Finance*, 809 F.2d at 271, *citing Camp* v. *Pitts*, 411 U.S. 138 (1973). In this case, two decisions are at the core of the administrative record: the June 19 decision by OFAC to block these vessels and the more recent decision of September 18 denying the plaintiffs petition to unblock the vessels.[2] Judicial review "is to be based on the full administrative record that was before the [administrative officer] . . . at the time he made his decision." *Overton Park*, 401 U.S. at 420. If this record is inadequate or incomplete in some respect, this Court can "obtain from the agency, either through affidavits or testimony, such additional explanation of the reasons for the agency decision as may prove necessary." *Camp* v. *Pitts*,

[2] The plaintiffs suggest that the final reviewable agency decision was the initial one to block the vessels. It appears that this assertion was made without receipt or knowledge of the September 18 denial of the request to unblock.

411 U.S. at 142. The record in this case is extensive and impressive. It has been given exacting scrutiny by this Court. And it is a role model of completeness and high-minded scholarship.

II.

A.

The administrative record is essentially the evidentiary basis on which the agency makes its decision. In this case, the record shows that the plaintiffs have had several opportunities to plead their case to OFAC since the June 19 order blocking the vessels. Both Captain Samardzic, the managing director of Milena, and plaintiffs' counsel have actively pursued the unblocking of the vessels. OFAC had access to statements by three of plaintiffs' experts on Yugoslavian law, as well as an article on privatization in Yugoslavia written under the auspices of the United Nations.[3] Additionally, OFAC was provided with copies of the plaintiffs' articles of incorporation, documents relating to the registration of the vessels in Malta, and documents relating to bank accounts and insurance held by the plaintiffs. Judging from the correspondence in the record, it is evident that representatives of the plaintiffs and defendants have held meetings and had many telephone conversations. And, of course, the preliminary injunction hearing held by this Court provided OFAC with yet another opportunity to consider the plaintiffs' arguments and evidence, in particular the testimony of Captain Samardzic. Nothing suggests that OFAC has declined to accept any submissions from the plaintiffs; and although they accuse OFAC of intentional delay, plaintiffs have not presented any proof that

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[3] B. Vukmir, "Privatization in Yugoslavia," U.N. Center for Transnational Corporations, September 20, 1990. Ironically, or perhaps predictably, both sides seek the shelter of this article in making their arguments to this Court.

the record is, in any respect, fatally incomplete.[4] A review of the record betrays such a suggestion.

But to say that the record is complete does not end this Court's analysis. The Court must determine whether the agency decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. 706(a). To do this, this Court must inquire into the factual basis for the decision and determine whether a clear error of judgment has occurred or whether the agency misapplied or misinterpreted the law. In this case, the Court finds that OFAC's decisions to block the vessels and then to deny the plaintiffs' petition for an unblocking were well within the bounds of reasonableness under the circumstances and thus do not constitute a reversible administrative determination.

B.

OFAC's September 18 Agency Decision denying the plaintiffs' petition to unblock the vessels is, in many respects, the culmination of OFAC's involvement in this matter, and thus provides the best summary of OFAC's justifications for the blocking. In that decision, OFAC suggests three bases for its denial of the plaintiffs' petition to unblock the vessels: first, the August 22 U.N. Sanctions Committee ruling; second, OFAC's interpretation of Yugoslavian law; and finally, JOP's status under that law.

The initial reason for OFAC's denial of the petition to unblock the vessels is that the UN Sanctions Committee issued a ruling that stated the "continued operation and associated transfers of funds or resources to the owners of four ships controlled and managed by the

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[4] The plaintiffs' claims of delay seem unfounded. The plaintiffs' last submission to OFAC occurred just two weeks before the Agency Decision was announced on September 18. Perhaps had OFAC acted any faster, the plaintiffs would be claiming now that defendants had acted too hastily.

Milena Ship Management Company of Malta . . . would be in violation of the sanctions established under resolution 757."[5] Resolution 757 is clear. It animates the President's orders. OFAC interprets this ruling to mean "that the release of the vessels would constitute a prohibited transfer of an economic resource both to the Government of Yugoslavia and a 'person' within Yugoslavia, namely, JOP."[6] That does not seem to this Court to be an unreasonable interpretation of U.N. expression. Neither the government nor this Court, however, seems legally bound by an opinion of the U.N. Sanctions Committee; such opinions are, nevertheless, advisory and provide the legal norm for the President's orders. *See e.g. Committee of U.S. Citizens in Nicaragua* v. *Reagan,* 859 F.2d 929 (D.C. Cir. 1988); *Diggs* v. *Shultz,* 470 F.2d 461 (1972). But in the final analysis, the only laws that could cause the blocking of the vessels are Executive Order 12808 and 12810, not the U.N. resolutions.

Next, OFAC's Agency Decision is anchored to its interpretation of Yugoslavian law. That it is a matter of interpreting law instead of findings facts shifts somewhat the parameters of judicial review. The plaintiffs assert that because OFAC has interpreted Yugoslavian law, plaintiffs are entitled to a *de novo* review of OFAC's conclusions under Fed. R. Civ. P. 44.1. It is the defendants' contention, invoking *Bamberger* v. *Clark,* 390 F.2d

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[5] See Agency Decision, Office of Foreign Assets Control, September 18, 1992 Enclosure 1.

The relevant portion of Resolution 757 reads:

> [a]ll States shall not make available to the authorities in the Federal Republic of Yugoslavia (Serbia and Montenegro) or to any commercial . . . undertaking in the Federal Republic of Yugoslavia (Serbia and Montenegro), any funds or any other financial or economic resources and shall prevent their nationals and any persons within their territories from removing from their territories or otherwise making available to those authorities or to any such undertaking any such funds or resources.

[6] Agency Decision September 18, 1992 p 3-4.

485, 488 (D.C. Cir. 1968), that as long as OFAC's interpretation is not "unreasonable or contrary to the plainly ascertainable intent" of the Yugoslavian legislature, this Court should defer to OFAC's decision and not conduct its own inquiry. While the court in *Bamberger* in fact overturned an agency's ruling on a question of German law, the lasting legacy of the case is the court's acknowledgement that deference to the agency's interpretation of foreign law can be appropriate. *See Nouve Industrie Elettriche di Legnano* v. *United States*, 739 F. Supp. 1567, 1571-72 (CIT 1990); *Merck & Co.* v. *U.S. International Trade Commission*, 774 F.2d 483, 488 (Fed. Cir. 1985).

It is this Court's opinion that deference to OFAC's interpretation of Yugoslavian law is particularly appropriate in this instance (although the Court has reviewed the law too, and cannot disagree with OFAC's conclusions). Plaintiffs had a full opportunity to submit evidence and did submit statements by three people on Yugoslavian law that were considered and even incorporated into OFAC's decision. After reviewing the affidavits as well as the article by Dr. Branko Vukmir, a legal advisor to the United Nations, OFAC concluded that the current system in Yugoslavia, in particular the concept of "social capital," gives rise to a residual government claim to the majority of a Yugoslav enterprise's capital. This Court is inclined to defer to OFAC's interpretation not only because the plaintiffs had the opportunity to submit expert evidence on the question of Yugoslavian law, but also because upon review of these materials, the Court agrees with the agency's characterization of the situation in Yugoslavia. Short of a complete privatization of a Yugoslavian enterprise, it appears that the government of Yugoslavia would retain an important interest in the enterprise. The idea of social capital as opposed to internal (personal) shares, the role of government in deciding the extent personal or internal shares can be issued in a relation to social capital, the overriding presence of governmental development funds, all are counterintuitive to plaintiffs' protestations

about Yugoslavian law. It is also instructive to recall how inconclusive plaintiff's presentation on this very issue was at the preliminary injunction hearing.

C.

As a final matter, this Court has reviewed OFAC's interpretation of the facts which lead it to believe that JOP is, in fact, owned or controlled by the Yugoslavian government. These include the fact that the ruling Socialist party permeates the decisionmaking apparatus of the economy as well as the government; the State's control, as representative of society, of the ultimate disposition of an enterprise's social capital; the government's statutory interest in social capital; the fact that there are no specific figures on the status of the JOP privatization and plaintiffs have not offered any evidence that the social capital is less than a majority; the evasive testimony of Captain Samardzic at the preliminary injunction hearing as to the government's claim if liquidation were to occur; the incomplete testimony of Mr. Ives; and the fact that Captain Samardzic, the Managing Director of both JOP and Milena, has had a long and distinguished career in the Yugoslavian government as both Foreign Minister from Montenegro and as a representative of the Yugoslav Chamber of Economy, a government-controlled agency. The Court is more than satisfied on the basis of the present record that the defendants' interpretation of the facts was neither arbitrary nor capricious.

For the reasons stated the plaintiffs have failed to carry their burden under Rule 56 and their motion for summary judgment in the form of declaratory relief and a permanent injunction is hereby DENIED.

New Orleans, Louisiana, September 28, 1992.

/s/ Martin L. C. Feldman
MARTIN L. C. FELDMAN
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

C.A. No. 92-2535

Section "F"

MILENA SHIP MANAGEMENT COMPANY, LTD., *et al.*,
Plaintiffs

v.

R. RICHARD NEWCOMB, *et al.*,
Defendants

STIPULATION AND ORDER

(Filed Oct. 1, 1992; Date of Entry Oct. 2, 1992)

WHEREAS, in the interest of judicial economy, the parties are desirous of an expeditious resolution of this litigation;

NOW, THEREFORE, the parties hereby agree and stipulate as follows:

1. None of the parties have additional evidence to offer beyond that which is already in the Court's record of this proceeding.

2. This action is hereby submitted to the Court for final judgment on the Court's record and this Stipulation.

3. All parties reserve whatever rights of appeal they may have from any final decision entered by the court in this litigation.

STUART M. GERSON
Assistant Attorney General

HARRY ROSENBERG
United States Attorney

/s/ Sandra Schraibman
SANDRA SCHRAIBMAN

/s/ Michael Sitcov
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New Orleans, La. 70163
(504) 585-7000

It is so ORDERED.

/s/ Martin L. C. Feldman
United States District Judge

Dated: 10-2-92

APPENDIX G

Federal Register
Vol. 57, No. 106
Tuesday, June 2, 1992

PRESIDENTIAL DOCUMENTS

Title 3—Executive Order 12808 of May 30, 1992

The President—Blocking "Yugoslav Government" Property and Property of the Governments of Serbia and Montenegro

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the International Emergency Economic Powers Act (50 U.S.C. 1701, *et seq.*), the National Emergencies Act (50 U.S.C. 1801, *et seq.*), and section 301 of title 3 of the United States Code.

I, GEORGE BUSH, President of the United States of America, find that the actions and policies of the Governments of Serbia and Montenegro, acting under the name of the Socialist Federal Republic of Yugoslavia or the Federal Republic of Yugoslavia, in their involvement in and support for groups attempting to seize territory in Crotia and Bosnia-Hercegovina by force and violence utilizing, in part, the forces of the so-called Yugoslav National Army, constitute an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States, and hereby declare a national emergency to deal with that threat.

I hereby order:

Section 1. Except to the extent provided in regulations, orders, directives, or licenses which may hereafter be issued pursuant to this order, all property and interests in property of the Government of Serbia and the Government of Montenegro that are in the United States, that

hereafter come within the United States, or that are or hereafter come within the possession or control of United States persons, including their overseas branches, are hereby blocked.

Sec. 2. Except to the extent provided in regulations, orders, directives, or licenses which may hereafter be issued pursuant to this order, all property and interests in property in the name of the Government of the Socialist Federal Republic of Yugoslavia or the Government of the Federal Republic of Yugoslavia that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of United States persons, including their overseas branches, are hereby blocked.

Sec. 3. Any transaction by any United States person that evades or avoids, or has the purpose of evading or avoiding, or attempts to violate, any of the prohibitions set forth in this order is prohibited.

Sec. 4. For the purposes of this order:

(a) The term "United States person" means any United States citizen, permanent resident alien, judicial person organized under the laws of the United States (including foreign branches), or person in the United States;

(b) The terms "Government of Serbia" and "Government of Montenegro" include the governments of Serbia and Montenegro, including any subdivisions thereof or local government therein, their respective agencies, intrumentalities and controlled entities, and any persons acting or purporting to act for or on behalf of any of the foregoing, including the National Bank of Serbia, the Serbian Chamber of Economy, the National Bank of Montenegro, and the Montenegrin Chamber of Economy;

(c) The terms "Government of the Socialist Federal Republic of Yugoslavia" and "Government of the Federal Republic of Yugoslavia" include the government of the former Socialist Federal Republic of Yugoslavia, the gov-

ernment of the newly constituted Federal Republic of Yugoslavia, their respective agencies, instrumentalities and controlled entities, and any persons acting or purporting to act for or on behalf of any of the foregoing, including the National Bank of Yugoslavia, the Yugoslav National Army, and the Yugoslav Chamber of Economy.

Sec. 5. The Secretary of the Treasury, in consultation with the Secretary of State, is hereby authorized to take such actions, including the promulgation of rules and regulations, and to employ all powers granted to the President by the International Emergency Economic Powers Act, as may be necessary to carry out the purposes of this order. Such actions may include prohibiting or regulating payments or transfers of any property, or any transactions involving the transfer of anything of economic value by any United States person to the Government of the Socialist Federal Republic of Yugoslavia, the Government of the Federal Republic of Yugoslavia, the Government of Serbia, the Government of Montenegro, any person in Serbia or Montenegro, or any person or entity acting for or on behalf of, or owned or controlled, directly or indirectly, by any of the foregoing. The Secretary of the Treasury may redelegate any of these functions to other officers and agencies of the United States Government, all agencies of which are hereby directed to take all appropriate measures within their authority to carry out the provisions of this order, including suspension of termination or licenses or other authorizations in effect as of the date of this order.

Sec. 6. Nothing contained in this order shall create any right or benefit, substantive or procedural, enforceable by any party against the United States, its agenices or instrumentalities, its officers or employees, or any other person.

Sec. 7. (a) This order shall take effect at 11:50 p.m. Eastern Daylight Time, May 30, 1992.

(b) This order shall be transmitted to the Congress and published in the Federal Register.

/s/ George Bush

THE WHITE HOUSE,
May 30, 1992.

Editorial note: For the President's letter to the Speaker of the House and the President of the Senate regarding the national emergency with respect to Yugoslavia, see issue 23 of the *Weekly Compilation of Presidential Documents.*

APPENDIX H

Federal Register
Vol. 57, No. 111
Tuesday, June 9, 1992

PRESIDENTIAL DOCUMENTS

Executive Order 12810 of June 5, 1992

Blocking Property of and Prohibiting Transactions With the Federal Republic of Yugoslavia (Serbia and Montenegro)

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the International Emergency Economic Powers Act (50 U.S.C. 1701, *et seq.*), the National Emergencies Act (50 U.S.C. 1601, *et seq.*), section 1114 of the Federal Aviation Act of 1958, as amended (49 U.S.C. App. 1514), section 5 of the United Nations Participation Act of 1945, as amended (22 U.S.C. 287c), and section 301 of title 3 of the United States Code, in view of United Nations Security Council Resolution No. 757 of May 30, 1992, and in order to take additional steps with respect to the actions and policies of the Federal Republic of Yugoslavia (Serbia and Montenegro) and the national emergency described and declared in Executive Order No. 12808.

I, GEORGE BUSH, President of the United States of America, hereby order:

Section 1. Except to the extent provided in regulations, orders, directives, or licenses which may hereafter be issued pursuant to this order, and notwithstanding the existence of any rights or obligations conferred or imposed by any international agreement or any contract entered into or any license or permit granted before the effective date of this order, all property and interests in property of the Government of the Federal Republic of Yugoslavia

(Serbia and Montenegro), and property and interests in property held in the name of the Government of the Federal Republic of Yugoslavia or of the former Government of the Socialist Federal Republic of Yugoslavia, that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of United States persons, including their overseas branches, are blocked.

Sec. 2. The following are prohibited, notwithstanding the existence of any rights or obligations conferred or imposed by any international agreement or any contract entered into or any license or permit granted before the effective date of this order, except to the extent provided in regulations, orders, directives, or licenses which may hereafter be issued pursuant to this order:

(a) The importation into the United States of any goods originating in, or services performed in, the Federal Republic of Yugoslavia (Serbia and Montenegro), exported from the Federal Republic of Yugoslavia (Serbia and Montenegro) after May 30, 1992, or any activity that promotes or is intended to promote such importation;

(b) The exportation to the Federal Republic of Yugoslavia (Serbia and Montenegro), or to any entity operated from the Federal Republic of Yugoslavia (Serbia and Montenegro), or owned or controlled by the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro), directly or indirectly, of any goods, technology (including technical data or other information controlled for export pursuant to the Export Administration Regulations, 15 C.F.R. Parts 766, *et seq.*), or services, either (i) from the United States, (ii) requiring the issuance of a license by a Federal agency, or (iii) involving the use of U.S. registered vessels or aircraft, or any activity that promotes or is intended to promote such exportation;

(c) Any dealing by a United States person related to property originating in the Federal Republic of Yugoslavia

(Serbia and Montenegro) exported from the Federal Republic of Yugoslavia (Serbia and Montenegro) after May 30, 1992, or property intended for exportation from the Federal Republic of Yugoslavia (Serbia and Montenegro) to any country, or exportation to the Federal Republic of Yugoslavia (Serbia and Montenegro) from any country, or any activity of any kind that promotes or is intended to promote such dealing;

(d) Any transaction by a United States person, or involving the use of U.S.-registered vessels and aircraft, relating to transportation to or from the Federal Republic of Yugoslavia (Serbia and Montenegro), the provision of transportation to or from the United States by any person in the Federal Republic of Yugoslavia (Serbia and Montenegro) or any vessel or aircraft registered in the Federal Republic of Yugoslavia (Serbia and Montenegro), or the sale in the United States by any person holding authority under the Federal Aviation Act of 1958, as amended (49 U.S.C. 1301, *et seq.*), of any transportation by air that includes any stop in the Federal Republic of Yugoslavia (Serbia and Montenegro);

(e) The granting of permission to any aircraft to take off from, land in, or overfly the United States, if the aircraft, as part of the same flight or as a continuation of that flight, is destined to land in or has taken off from the territory of the Federal Republic of Yugoslavia (Serbia and Montenegro);

(f) The performance by any United States person of any contract, including a financing contract, in support of an industrial, commercial, public utility, or governmental project in the Federal Republic of Yugoslavia (Serbia and Montenegro);

(g) Any commitment or transfer, direct or indirect, of funds, or other financial or economic resources by any United States person to or for the benefit of the Government of the Federal Republic of Yugoslavia (Serbia and

Montenegro) or any other person in the Federal Republic of Yugoslavia (Serbia and Montenegro);

(h) Any transaction in the United States or by a United States person related to participation in sporting events in the United States by persons or groups representing the Federal Republic of Yugoslavia (Serbia and Montenegro);

(i) Any transaction in the United States or by a United States person related to scientific and technical cooperation and cultural exchanges involving persons or groups officially sponsored by or representing the Federal Republic of Yugoslavia (Serbia and Montenegro), or related to visits to the United States by such persons or groups other than as authorized for the purpose of participation at the United Nations.

Sec. 3. Nothing in this order shall apply to (i) the transshipment through the Federal Republic of Yugoslavia (Serbia and Montenegro) of commodities and products originating outside the Federal Republic of Yugoslavia (Serbia and Montenegro) and temporarily present in the territory of the Federal Republic of Yugoslavia (Serbia and Montenegro) only for the purpose of such transshipment, and (ii) activities related to the United Nations Protection Force (UNPROFOR), the Conference on Yugoslavia, or the European Community Monitor Mission.

Sec. 4. Any transaction by any United States person that evades or avoids, or has the purpose of evading or avoiding, or attempts to violate, any of the prohibitions set forth in this order is prohibited.

Sec. 5. For the purposes of this order:

(a) The term "United States person" means any United States citizen, permanent resident alien, juridical person organized under the laws of the United States (including foreign branches), or any person in the United States, and vessels and aircraft of U.S. registration;

(b) The term "the Federal Republic of Yugoslavia (Serbia and Montenegro)" means the territory of Serbia and Montenegro;

(c) The term "the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro)" includes the government of the newly constituted Federal Republic of Yugoslavia, the Government of Serbia, and the Government of Montenegro, including any subdivisions thereof or local governments therein, their respective agencies, instrumentalities and controlled entities, and any persons acting or purporting to act for or on behalf of any of the foregoing, including the National Bank of Yugoslavia, the Yugoslav National Army, and the Yugoslav Chamber of Economy, the National Bank of Serbia, the Serbian Chamber of Economy, the National Bank of Montenegro, and the Montenegrin Chamber of Economy.

Sec. 6. The Secretary of the Treasury, in consultation with the Secretary of State, is hereby authorized to take such actions, including the promulgation of rules and regulations, and to employ all powers granted to the President by the International Emergency Economic Powers Act and the United Nations Participation Act, as may be necessary to carry out the purposes of this order. Such actions may include prohibiting or regulating payments or transfers of any property, or any transactions involving the transfer of anything of economic value, by the any United States person to the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro), any person in the Federal Republic of Yugoslavia (Serbia and Montenegro), or any person or entity acting for or on behalf of, or owned or controlled, directly or indirectly, by any of the foregoing. The Secretary of the Treasury may redelegate any of these functions to other officers and agencies of the United States Government, all agencies of which are hereby directed to take all appropriate measures within their authority to carry out the provisions of this order, including suspension or termination

of licenses or other authorizations in effect as of the date of this order.

Sec. 7. All delegations, rules, regulations, orders, licenses, and other forms of administrative action made, issued, or otherwise taken under Executive Order No. 12808 and not revoked administratively shall remain in full force and effect under this order until amended, modified, or terminated by proper authority.

Sec. 8. Nothing contained in this order shall create any right or benefit, substantive or procedural, enforceable by any party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

Sec. 9. (a) This order is effective immediately.

(b) This order shall be transmitted to the Congress and published in the Federal Register.

/s/ George Bush

THE WHITE HOUSE,
June 5, 1992.

Editorial note: For the President's letter to the Speaker of the House and the President of the Senate, Executive Order 12506, and a message to Congress regarding the national emergency with respect to Yugoslavia, see issue 23 of the *Weekly Compliation of Presidential Documents.*

APPENDIX I

DEPARTMENT OF THE TREASURY
WASHINGTON

URGENT! URGENT! URGENT!

To: Chief Operating Officers
at all financial institutions in the United States and all overseas branches of U.S. financial institutions

NOTIFICATION OF STATUS OF YUGOSLAV ENTITIES
(07/06/92)

The Treasury Department has been asked to clarify the status of various entities in which the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) may have an interest or which may be located in the Federal Republic of Yugoslavia (Serbia and Montenegro) ("Yugoslavia") for purposes of Executive Orders 12808 and 12810. Based on information currently available to the Office of Foreign Assets Control, the following partial list has been compiled.

The entities appearing on the "Blocked Yugoslav Entities Currently Identified" list are deemed to be owned or controlled by the Government of Yugoslavia and therefore blocked by Sections 1 and 2 of Executive Order 12808 and Section 1 of Executive Order 12810. In addition, many of these entities are located in Yugoslavia and thus subject to the transfer restrictions contained in Section 2(g) of Executive Order 12810. Section 2(g) prohibits transfers to or for the benefit of the Government of Yugoslavia or persons or entities located in Yugoslavia.

This list is not all-inclusive. All entities located or organized in Serbia and Montenegro, and their foreign subsidiaries, are presumed to be owned or controlled by the Government of Yugoslavia. U.S. persons are prohibited

from engaging in transactions with such entities, unless the transactions are licensed by the Office of Foreign Assets Control. In addition, all assets within U.S. jurisdiction owned or controlled by these entities are to be treated as blocked. U.S. persons are not prohibited, however, from paying funds owed to these entities into blocked accounts held in domestic U.S. financial institutions. Companies on the list known to be located in the U.S. are marked by an asterisk (*).

Warning: This list is subject to revision as additional information becomes available. Do not assume that a particular entity is free of ownership or control by the Government of Yugoslavia or that it is located outside of Yugoslavia based solely on its absence from the "Blocked Yugoslav Entities Currently Identified" list.

Blocked Yugoslav Entities Currently Identified
Banks and Financial Institutions:

* * * *

Nonbanking Institutions:

* * * *

Jugoslovenska Oceanska Plovidbe (also known as "Yugoslav Ocean Lines")

* * * *

/s/ Richard Newcomb
July 6, 1992

General Notice
No. 1
FAC No. 128042B

APPENDIX J

Federal Register/Vol. 57, No. 139/Monday, July 20, 1992

DEPARTMENT OF THE TREASURY
Office of Foreign Assets Control

The Federal Republic of Yugoslavia (Serbia and Montenegro), Notification of Status of Controlled Yugoslav Entities

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: General Notice No. 1.

SUMMARY: The Treasury Department has been asked to clarify the status of various entities in which the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) may have an interest or which may be located in the Federal Republic of Yugoslavia (Serbia and Montenegro) may have an interest on which may be located in the Federal Republic of Yugoslavia (Serbia and Montenegro) for purposes of Executive Orders 12808 and 12810. Based on information currently available to the Office of Foreign Assets Control, the following partial list of entities owned or presumed to be controlled by the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) has been compiled.

FOR FURTHER INFORMATION CONTACT: Loren L. Dohm, chief, Blocked Assets Division, Tel.: (202) 622-2410, or William B. Hoffman, Chief Counsel, Tel.: (202) 622-2410, Office of Foreign Assets Control, Department of the Treasury, Washington, DC.

SUPPLEMENTARY INFORMATION: On May 30, 1992, the President issued Executive Order 1208, declar-

ing a national emergency with respect to Serbia and Montenegro, and invoking the authority, inter alia, of the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.). The Executive order blocks all property and interests in property of the Governments of Serbia and Montenegro, as well as all property and interests in property in the name of the former Government of the Socialist Federal Republic of Yugoslavia or the Government of the Federal Republic of Yugoslavia. On June 4, 1992, the President issued Executive Order 12810, imposing additional sanctions on the Federal Republic of Yugoslavia (Serbia and Montenegro), consistent with United Nations Security Council Resolution 757, dated May 30, 1992.

The executive order block, inter alia, all property and interests in property of the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro). The term "Government of the Federal Republic of Yugoslavia (Serbia and Montenegro)" includes:

(1) The state and the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro), as well as any political subdivision, agency, or instrumentality thereof, including the National Bank of Yugoslavia, the Yugoslav National Army, the Yugoslav Chamber of Economy, the National Bank of Serbia, the Serbian Chamber of Economy, the National Bank of Montenegro, and the Montenegrin Chamber of Economy;

(2) Any partnership, association, corporation, or other organization substantially owned or controlled by the foregoing;

(3) Any person to the extent that such person is, or has been, or to the extent that there is reasonable cause to believe that such person is, or has been, since the effective date, acting or purporting to act, directly or indirectly, on behalf of any of the foregoing; and

(4) Any other person or organization determined by the Director of the Office of Foreign Assets Control to be included within this section.

The entities appearing on the "Blocked Yugoslav Entities Currently Identified list are owned or deemed to be controlled by the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) and are therefore blocked by sections 1 and 2 of Executive Order 12808 and section 1 of Executive Order 12810. In addition, many of these entities are located in the Federal Republic (Serbia and Montenegro) and thus subject to the transfer restrictions contained in section 2(g) of Executive Order 12801. Section 2(g) prohibits transfers to or for the benefit of the Government of the Federal Republic of Yugoslavia (Serbia and Montenergo) or persons or entities located in the Federal Republic of Yugoslavia (Serbia and Montenegro).

This list is not all-inclusive. All entities located or organized in the Federal Republic of Yugoslavia (Serbia and Montenegro), and their foreign subsidiaries, are presumed to be controlled by the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro). U.S. person are prohibited from engaging in transactions with such entities, unless the transactions are licensed by the Office of Foreign Assets Control. In addition, all assets within U.S. jurisdiction owned or controlled by these entities are to be treated as blocked. U.S. persons are not prohibited, however, from paying funds owed to these entities into blocked accounts held in domestic U.S. financial institutions. Entities on the list known to be located in the United States are marked by an asterisk (*).

Entities wishing to provide information concerning ownership or control of any listed entity by the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro), or to apply for licenses to authorize specific transatcions or clasess of transactions, should write to the Office of Foreign Assets Control.

Warning: This list is subject to revision as additional information becomes available. Do not assume that a particular entity is free of ownership or control by the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) or that it is located outside Serbia or Montenegro based solely on its absence from the "Blocked Yugoslav Entities Currently Identified" list.

Authority: 50 U.S.C. 1701 et seq.; 50 U.S.C. 1601 et seq.; 22 U.S.C. 287c; 49 U.S.C. App. 1514; E.O. 12808, 57 FR 23299 (June 2, 1992); E.O. 12810, 57 FR 24347 (June 9, 1992).

Blocked Yugoslav Entities Currently Identified

Banks and Financial Institutions

* * * *

Nonbanking Institutions

* * * *

Jugoslavenska Oceanska Plovidba (also known as "Yugoslav Ocean Lines")

* * *

/s/ Richard Newcomb,
Director, Office of Foreign Assets Control.
Approved: July 14, 1992
Peter K. Nunez,
Assistant Secretary (Enforcement).

[FR Doc. 92-17011 Filed 7-17-92; 8:45 am]

APPENDIX K

Letter to Congressional Leaders on
the National Emergency With
Respect to Yugoslavia

May 30, 1992

Dear Mr. Speaker: (Dear Mr. President:)

Pursuant to section 204(b) of the International Emergency Economic Powers Act, 59 U.S.C. 1703(b), and section 301 of the National Emergencies Act, 50 U.S.C. 1631, I hereby report that I have exercised my statutory authority in order to declare a national emergency to respond to the threat to the national security created by the actions and policies of the Governments of Serbia and Montenegro, acting under the name of the Socialist Federal Republic of Yugoslavia, or the Federal Republic of Yugoslavia, and to issue an Executive order that blocks all property including bank deposits of the Governments of Serbia and Montenegro, as well as property in the name of the Government of the Socialist Federal Republic of Yugoslavia or the Government of the Federal Republic of Yugoslavia, in the United States or in the control of U.S. persons including their overseas branches.

The Secretary of the Treasury is authorized to issue regulations implementing these prohibitions.

I am enclosing a copy of the Executive order that I have issued.

I have authorized these measures in response to the actions and policies of the Governments of Serbia and Montenegro, acting under the name of the Socialist Federal Republic of Yugoslavia or the Federal Republic of Yugoslavia, in their involvement in and support for groups attempting to seize territory in Croatia and Bosnia-Hercegovina by force and violence utilizing, in part, the forces

of the so-called Yugoslav National Army. The grave events in Serbia and Montenegro constitute an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States. The measures that I have taken today express our outrage at the actions of the Serbian and Montenegrin Governments and will prevent those governments from drawing on monies and properties within U.S. control.

Sincerely,

GEORGE BUSH

Note: Identical letters were sent to Thomas S. Foley, Speaker of the House of Representatives, and Dan Quayle, President of the Senate.

APPENDIX L

U.S. BACKS PLAN TO CLEAR WAY FOR BOSNIA AID

Associated Press News Service

The U.S. endorsed the opening of a land corridor to supply Bosnia with food and medicine and the use of naval and air power to make sure Serbian militia don't interfere with the humanitarian effort.

A senior administration official, in Munich for the Group of Seven meeting, said the summit leaders would commit themselves to "significant support for whatever is necessary" to provide relief for shattered Yugoslavia.

Meanwhile in Washington, the U.S. Treasury Department broadened the United Nations-led economic embargo against the Yugoslav government by extending it to all companies located in Serbia and Montenegro.

Another U.S. official in Munich said that if relief deliveries falter, the U.S. would urge the U.N. to authorize military force if necessary to provide humanitarian help. It was the first time the U.S. has referred directly to "military force."

"We are determined to do everything we can to see the operation succeed," the U.S. officials said as the crisis in Yugoslavia took center stage at the 18th annual economic summit of the world's leading industrial nations.

The relief effort so far is restricted to flights into Sarajevo airport.

But the U.S. official said the opening of the airport in the Bosnian capital "is at best a first step" and too small to handle supplies for the 300,000 to 350,000 Bosnians under attack from Serbian militia for the past three months.

U.S. President George Bush was taking up the new and more muscular U.S. stance with his six summit partners at a dinner hosted by German Chancellor Helmut Kohl.

'Do Its Part'

The senior U.S. official gave his account of what could be in the offing in the troubled East European country after Secretary of State James Baker met for two hours with the six foreign ministers.

The official stressed that the U.S. hoped the Serbs, Croatians and other warring parties in shattered Yugoslavia would recognize the plight of the Bosnians and permit food and medicine to get to them.

But if relief is denied to Bosnia, he said, "the United States stands ready to do its part" and will call on the U.N. Security Council to employ "different measures."

The official didn't spell out what those measures might be. However, he noted that America's "comparative advantage would be in the area of naval and air forces."

He said an air and naval blockade of Serbia to enforce the world-wide trade embargo could be in the offing. "We are looking at various steps that can be taken to strengthen those sanctions," he said.

'Pay a Price'

The objective, the official added, is "to impress on the Serbian regime it will continue to pay a price until it is willing to behave more responsibly."

Dieter Vogel, chief spokesman for German Chancellor Helmut Kohl, said the summit leaders likely would adopt a communique similar to one endorsed at the European Community summit in Lisbon last month. But he said work was still continuing on the statement.

The EC communique said that "while giving priority to peaceful means, the European Council doesn't exclude support for the use of military means by the U.N. to achieve these humanitarian objectives" in Bosnia.

The move by the Treasury in Washington to expand the embargo came because violence and rapid changes have made it difficult to identify ownership of entities subject to the embargo, according to R. Richard Newcomb, director of the department's Office of Foreign Asset Control.

'All Companies'

"This forces us to regard all companies in Serbia or Montenegro and their foreign subsidiaries as either owned or controlled by the Yugoslav government," he said.

On June 1, the department announced it was freezing the assets of the governments of Yugoslavia and Serbia and Montenegro, the two republics left in the Yugoslav federation. The freeze included the state-owned airline and banks.

The new, broader list of 284 companies, including 10 served notice on Monday, is being released to "help Americans, banks, businesses and individuals stay within the boundaries of the law," Mr. Newcomb said.

"This list effectively weakens Yugoslavia's ability to skirt sanctions by operating through private companies," he added.

[The Wall Street Journal Europe,
Tuesday, July 7, 1992, page 2]

APPENDIX M

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Case No. 92-2535

Section "F"

MILENA SHIP MANAGEMENT COMPANY, LTD., SOUTH CROSS SHIPPING LTD., SOUTH ADRIATIC BULK SHIPPING LIMITED, AND GULF & EASTERN STEAMSHIP AND CHATERING CORP.,

Plaintiffs

Versus

R. RICHARD NEWCOMB, DIRECTOR OFFICE OF FOREIGN ASSETS CONTROL OF THE DEPARTMENT OF THE TREASURY, AND JAMES MURRAY, SENIOR SPECIAL AGENT, UNITED STATES CUSTOMS SERVICE,

Defendants

Declaration of Stephen B. Ives, Jr.

(Filed Aug. 7, 1992)

I, Stephen B. Ives, Jr., am of counsel to the firm of Popper, Hamilton & Scheetz in Washington, D.C. I have been contacted by Mr. John H. Clegg of the law firm of Chaffe, McCall, Phillips, Toler & Sarpy to review the various submissions of the Office of Foreign Assets Control, United States Department of the Treasury, with respect to Yugoslav law and practice. My qualifications as an expert in Yugoslav law and practice are contained in my biographical resume. (See Attachment A).

I have reviewed the Declaration of R. Richard Newcomb as well as the exhibits relied upon by the Office of

Foreign Assets Control in the above captioned matter. Following are my opinions and conclusions concerning the state of ownership and management of enterprises in Yugoslavia generally and specifically how they relate to Jugoslavonska Oceanska Plovidba (hereinafter JOP).

In order to understand the relationship between the government and business enterprises in Yugoslavia, it is essential to appreciate the difference between Yugoslav practice and those that took place in what was the Soviet Bloc.

Yugoslav Economy compared with Soviet Communism. Forty-four years ago, in 1948, President Tito decided to stand up to Stalin and therefore declared Yugoslavia's independence from Soviet hegemony and began an independent course both in international affairs and in domestic political and economic activity. Two years later, in 1950, the United States began a substantial foreign aid program to Yugoslavia, designed to support Tito's effective resistence to Soviet interference. This program went forward despite the existence of Cold War conditions and the common belief that Yugoslavia was part of "monolithic Communism". Yugoslavia, with U.S. help, went on to prove that Communism was not monolithic, and the Soviet Union could not—and did not—dominate Yugoslavia.

By the end of 1960s, the Yugoslavs had abandoned any pretense of the "command economy" then in vogue in the Soviet block. Command economies were based on Five-Year Plans and annual implementing plans that gave orders to each unit in the economy that directed the type and amount of production, the source and price of raw materials, the customers and sales prices for products, and the ultimate retail markets and prices—all determined by the bureaucrats who authored the plan. The details in the plan were carried out by dozens of industrial ministries, such as the Ministry of Machine Tool Building, Ministry of Light Industry, Ministry of Tractor Produc-

tion, etc. These ministries were absolute bosses of the industrial units assigned to them, and they saw to it that the plan was implemented by means of "state orders."

Yugoslavia had neither such a Five-Year Plan nor annual implementing plans. It did not have the structure of industrial ministries that typified the Block countries. It had no practice of state orders. All these were replaced by a unique Yugoslav system, involving social ownership and worker self-management.

Social Ownership. During the 1960s, the Yugoslavs made a major change in their view of the socialist economy. They directed that the means of production (i.e., the enterprises) would not be owned by the state, but rather by the society; hence the term "socially-owned enterprises." This simple change worked a major change in practice: it meant, "Bureaucrat, and five-year planner, take your hands off; you do not own, control or direct our economy."

The concept of ownership by the society was, of course, too nebulous to provide practical direction for the economy. The Yugoslavs therefore developed the principle of worker self-management, a scheme of industrial democracy that gave the workers the power to manage the enterprises in which they work. In many ways they became the equivalent of shareholders in the West, as they elected management and shared in the profits or losses of the enterprise. The workers councils that they elected performed many of the functions of our boards of directors. These councils decided what to produce, how to distribute, whether to vote dividends to the workers from profits, whether to invest in new activities, etc. And in fact they made these decisions without interference from government as long as they did not violate the Law on Associated Labor, which in general served the office of our corporation law.

In effect, the Yugoslavs abandoned the basic tenets of Marxist-Leninist Communism, although in a strange way

they were not quite able to admit it. One of the basic concepts established in the 1974 Constitution was the principle, "From each according to his ability, to each according to his labor." This was an obvious corruption of the Communist Manifesto's familiar "From each according to his ability, to each according to his *need*," and the change constituted a statement that any capitalist could accept. Yet the Constitution saw fit to put the statement in quotation marks. (See Constitution, Basic Principles, II.)

Over the years, the Yugoslav scheme had successes as well as failures. Stores there were full of goods with a great variety available for consumer choice. There were no lines of people desperately seeking whatever product the system made available, as has been chronic in the Soviet Block countries. The only lines I remember seeing in Yugoslavia during the 1970s and 80s were to buy tickets to rock concerts or sporting events; in Russia, however, they were, and still are, omnipresent.

The Yugoslav society was also relatively open and there was substantial, although not perfect, recognition of the rule of law. Illustratively,

—Foreign private investment was encouraged through joint ventures, and foreign investors were permitted effective control of the ventures in which they invested; their worries were not with government interference, but with their concerns about possible runaway workers' actions.

—Any Westerner could get a visa at the border of Yugoslavia in about one minute and he could travel freely about the country.

—The Yugoslavs never collectivized agriculture; farmers retained ownership of their land and freedom to grow what they chose and to sell to whom they decided.

—There was a functioning Constitutional Court, which reviewed laws and which declared several unconstitu-

tional, on occasion to the substantial embarrassment of the government.

Recent Changes. Nevertheless, beginning in the mid-1980s, the Yugoslavs began to realize that they had carried industrial democracy too far and concluded that they must restrict their economy so that enterprises would be controlled by investors rather than by workers. A series of laws beginning in 1988 began the conversion of the economy. The new Federal Law on Enterprises began to displace the ideas of socially-owned enterprises and self-management that were enshrined in the 1974 Constitution and the old Law on Associated Labor. The Law on Enterprises was only partially implemented by the time that the former Yugoslavia began to fall apart and the civil war began.

This law is, however, crucial to the present case because it is the law under which JOP was transformed. That transformation was approved by the District Commercial Court in Titograd on November 17, 1989 (see Exhibit "E-1A" to Supplemental Memorandum exhibits). Thus, that change occurred before the passage on December 22, 1989 of the first Yugoslav law on privatization (see Government's Exhibit 1, the Vukmir article, p. 1). Statutory privatization, which forms the source of the Government's case, could not have been involved. The Commercial Court decree did in turn rely upon a decree of September 28, 1989 of the "Federal Ministry of Foreign Economical Relations"; although I have not seen the latter decree, the restructuring of JOP included the sale of shares to foreigners, and the cited federal ministry was the body charged with registering foreign investment.

Absence of Government and Party Control. In his Declaration Mr. Newcomb states

> "After World War II, Yugoslav companies were 'socially-owned,' which in effect meant that they were managed by workers' councils composed of members elected from a slate of candidates selected

> by the Yugoslav League of Communists, then the ruling party of the SFRY and the predecessor of the current ruling parties in Montenegro and Serbia. The Communist Party thus controlled both the government and the economy." (Declaration, pp. 4-5).

His conclusion is contrary, first, to the controlling law of Yugoslavia and, second, to my own experience.

First, under the controlling law: The Law on Enterprises defines clearly the purpose of Yugoslav enterprises and how they are to be controlled, as follows (emphasis supplied):

> "Enterprises are legal entities engaged in economic activities for the purpose of *earning income or making profit*." (Art. 1)

> "The following shall be in mixed ownership: joint-stock companies, limited liability companies, limited partnerships, companies with unlimited joint and several liability of their members, when assets in various forms of ownership are invested in them—*social ownership*, cooperative ownership, citizens' ownership, ownership of civil legal entities, and in ownership of foreign persons." (Art. 2, Para. 3)

> "Enterprises in social ownership shall be managed by workers. . . . The enterprises referred to in Paragraph 2 of this Article [i.e., with mixed ownership], in which there is also a share of social capital, *shall be managed, apart from owners, also by representatives of the social capital, proportionally to the share of the social capital in the total capital*, unless otherwise provided by the by-laws and/or articles of association" (Art. 3)

For the procedure of election of the workers' council and statement of its powers, see Articles 47 and 49.

The key provision describing control of mixed enterprises, which like JOP contain both social capital and share capital, is set out in Article 122 as follows:

> "The owners shall have voting rights at the meeting of a mixed ownership enterprise, proportionally to the capital invested, unless otherwise provided by the by-laws and/or articles of association.
>
> *"When the total capital of an enterprise as referred to in Paragraph 1 of this Article also includes share of social capital,* the voting rights at the meeting shall also be afforded to representatives of the social capital, which can either be the workers of that enterprise or specialists outside the enterprise, *proportionally to the share of social capital in the total capital,* unless otherwise provided by the by-laws and or articles of association."

Finally,

> "The decision to change the status of an enterprise (partition, fusion or take-over) may be made by its managing body." (Art. 187a)

Thus, the law makes clear that the *owners* of interests in the enterprise, whether social (i.e., through the workers) or private, control the operations and destiny of the Yugoslav enterprise. That destiny can include bankruptcy under Yugoslav law. (See Exhibit "F" to Plaintiff's Supplemental Memorandum, Yugoslav Compulsory Settlement, Bankruptcy and Liquidation Law.) The Law on Enterprises makes no provision for control by government other than by the types of indirect regulation familiar to us in the West. In Yugoslavia the owners manage and are responsible for the success or failure of their enterprise to the extent of their investment.[1]

---

[1] I have recently learned that the Serbian Government has taken over ten enterprises as "public enterprises." These are utility companies covering electric power, railroads, water, etc. They operate under a different law which provides that the Serbian Government will subsidize any losses in these utilities. The law is said to provide for up to 49% privatization, but none has occurred in these loss-making entities.

Second, under my experience: In the course of literally hundreds of negotiations and discussions over 20 years with managers of Yugoslav enterprises, many of them quite intimate in nature, I can recall only two mentions of the involvement of the Yugoslav League of Communists (the Yugoslav Community Party) in the functioning of an enterprise. Both involved the role of the party in approving the appointment of a general director of an enterprise. Based on many discussions concerning the selection of workers' councils (the specific action mentioned by Mr. Newcomb), the party was only rarely, if ever, involved, or, to be precise, was involved in no case that I know of. Even the party's involvement in the selection of a general director was extra-legal and informal, as the Law of Enterprises (and its predecessor laws) provide a selection process based on interviews, etc. (See Law on Enterprises, Arts. 54-55).

Although the party may have been involved to some extent in personnel matters, my conclusion that it did not interfere in the business decisions of enterprises stems not only from the absence of its mention, but also on the list of concerns that enterprise managers did identify. They were worried about familiar managerial issues: will this be profitable?; how can I persuade the bank to make a loan for the project? what is the competitive picture in the Yugoslav market and in markets abroad? how can I persuade the workers' council (i.e., acting as a board of directors) to approve the investment of funds that could otherwise be distributed to the workers? These are the issues that managers talked about. They have also often displayed great disdain for the bureaucracy that might interfere with the pursuit of profits, for example, by raising legal issues concerning the registration of a foreign investment. The contrast between the attitudes of businessmen in Yugoslvia and those in Five-year Plan countries such as the USSR and Poland, was extreme. In the latter countries, managers feared the government ministers who were in every sense their bosses; on the other hand, Yugoslav managers spoke of them very much

as U. S. businessmen speak of bureaucrats in Washington. In general, in my experience Yugoslav businessmen were driven by profit motives, not by government or party dictation. In fact, I know of no instance of such direction affecting a business decision other than the two personnel matters mentioned above.

Dr. Vukmir's Analysis. Mr. Newcomb's Declaration starts his analysis of the Yugoslav scene with a "presumption that Yugoslav entities are controlled by the Government of Yugoslavia." (p. 4). To support his "presumption," he cites an article by Dr. Branko Vukmir as the basis of his review of the "historical structure" of the Yugoslav economy. Mr. Newcomb does not say what part of that article supports his thesis of government control of Yugoslav enterprises. On the contrary, Dr. Vukmir's article leads to an opposite conclusion. He writes (emphasis added):

> "Under the Constitution of 1974, Yugoslav enterprises were not considered as state enterprises and their property was not considered as state owned property. Enterprises were managed on the basis of 'self-management principles', while the assets belonging to enterprises were considered as 'social property'. This property did not belong to anyone in particular. *Workers in Yugoslav enterprises had an 'inalienable right to manage' the social property of their enterprises.*" (p. 1)
>
> "The present legal position . . . is such that enterprises are fully entitled to dispose of 'social capital'." (p. 2)
>
> "If an *enterprise decides* to be offered for sale . . . ." (p. 4)
>
> "If an enterprise sells one of its parts and this part becomes another enterprise, the proceeds of such sales do not belong to the Funds but to the enterprise which has sold its part. Similarly, *if an enter-*

> *prise opts to only increase its capital base and issue shares in order to acquire 'additional' capital, such acquired capital belongs to the enterprise.*" (p. 9)
>
> "An interesting feature of the Yugoslav legislation is that the State did not try to get directly hold of the proceeds of the sale of social capital." (p. 9)
>
> "An interesting feature of the law as it now stands, is that *the State has apparently not reserved for itself any controlling or approving functions in the sales procedure.*" (p. 12)
>
> "The *decision to be offered for sale has been entrusted to the enterprises themselves.* This approach is in conformity with the long standing Yugoslav approach to enterprises which made them quite independent in making business decisions. The decision on prices and other relevant conditions of sale are to be decided by the management organs of the enterprises." (p. 12)
>
> "The absence of governmental controls of the valuation procedure . . . ." (p. 13)

The Vukmir article does not support the Government's argument. On the contrary it points to the tradition of worker control, not that of government. His key point bears repeating, that the privatization process conforms to

> ". . . the long standing Yugoslav approach to enterprises which made them quite independent in making business decisions." (p. 12)

Inconsistent Treasury Department Decision. There is another wholly separate indication of the lack of government control over the details of the management of an enterprised activity. The source in this case is Mr. Newcomb's own U.S. Treasury Department. In a 1977 decision that has since been consistently followed, it held that the Yugoslav economy differed from that in the

Communist states of the Soviet Bloc. Specifically, it decided that

> ". . . the economy of Yugoslavia is not state-controlled to an extent that sales or offers of sales of such or similar merchandise in Yugoslavia do not permit a determination of [home market price]."

(U.S. Treasury Department Antidumping's Decision on Animal Glue and Inedible Gelatin from Yugoslavia, 42 Fed. Reg. 39288 (August 3, 1977), Attachment B.) The issue there was whether the commercial markets in Yugoslavia set prices on the basis of economic, rather than bureaucratic factors. If so, under antidumping procedure, Treasury would use (and in fact did use those domestic prices to determine whether sales to the United States had been made for less than fair value—i.e., at dumping prices that had to be offset by added U.S. tariff duties. If Yugoslavia had been determined to have a non-market economy controlled by government plans and decisions, an entirely different procedure would be used. Treasury's formal holding that the Yugoslav economy is not state-controlled has, as indicated, been followed by the U.S. Government in antidumping cases regularly since 1977.

As indicated above, this decision by the U.S. Government is consistent with my understanding and my experience with Yugoslav law as verified by Dr. Vukmir in the article Mr. Newcomb relies upon. In my view Mr. Newcomb's "presumption" of Yugoslav government control is ill-founded.

Non-Relevance of Fund Receiving Proceeds. Finally, Mr. Newcomb concludes that the existence of a fund, said to be controlled by the government, into which some privatization proceeds are paid, creates government control of the privatization process and confirms that it owns the assets being privatized. His statement is not very clear, however, because he says "We *understand* this

requirement to *indicate* that the government . . . asserts its ownership". From his "understanding" of the "indication", he concludes that "We *believe* it is the government itself, and not the workers, that should be seen as the original owner of these businesses and their assets." Declaration, p. 5) I do not agree with his conclusion.

First, in JOP's case no privatization law was involved in its restructuring. That restructuring occurred before any privatization law had even been passed. (See above). Thus, there was no possible payment to any fund that may have been created under a later privatization law.

Second, an analysis of the privatization laws rebuts the conclusions Mr. Newcomb would have the court reach. The following is a review of the first Yugoslav privatization law, the Social Circulation and Management Law, enacted December 22, 1989 (Attachment C.) The 1980 revised law, renamed the Law on Social Capital (Exhibit 2) is similar for present purposes and is well analyzed by Dr. Vukmir (Exhibit 1) as discussed above.

Consistent with the general structure of the Yugoslav economy, the 1989 Law provided that "[t]he decision to sell social capital shall be made by the workers' council, unless otherwise provided by the Enterprise's by-laws." (Art. 2). The same article adds that if the enterprise has outstanding share capital, the owner of those shares shall participate with the workers' council. There is no mention here of any role of government. Once the decision to sell has been made by the enterprise, the law provides that the price cannot be lower than either book or estimated value.

The proceeds under this sale are not to be paid to the enterprise but to a fund Mr. Newcomb refers to, which does appear to be an arm of government. (Art. 3). But its role is not to acquire an ownership interest or even to do the selling, but only to receive the proceeds of some sales. For example, Article 4 provides that "[w]hen

selling the social capital, the employees of the Enterprise concerned shall take" the steps necessary to set the price, not the fund. The fund may protect its expectancy in the proceeds, but only if the enterprise proposes to sell at a price below the statutory level. It may also provide incentives to workers to buy into the selling enterprises (Art. 7), a concept that soon became regularized in price discounts and credit terms that were spelled out in detail in the 1990 revised form. But it has no ownership interest in the assets being sold.

The 1989 statute provides that the privatized enterprises will be managed by its shareholders, except that, if it still contains social capital not privatized, the shareholders will share managerial power with the workers. (Art. 5). Profits will be divided in the same manner. These terms are consistent with the roles heretofore played under worker self-management and especially with the Law of Enterprises (see above), and there is no basis to conclude that government plays any managerial role here.

Finally, the 1989 law, like that in 1990, permits the workers council to seek and to obtain additional investment itself, as a socially-owned enterprise, with the investor becoming a shareholder. (Art. 6(2).) Again, this is a decision by the workers, not by government, and it has the major advantage to the enterprise that it, rather than the fund, receives the sales proceeds. Not surprisingly, this is the route that most enterprises have chosen. It is similar to the method JOP took under the Law on Enterprises, even before there was a privatization law.

Under this technique the workers council votes to raise additional funds for the enterprise by issuing shares that are sold to outsiders, a technique very familiar to us in the United States. Here again the fund has no role in the decision to issue shares, to determine the investors, or to set the prices, as long as they satisfy the statutory min-

imum. And in this case the fund receives no proceeds. (See Government Exhibit 1, Vukmir article, pp. 9, 12).

In fact, almost all privatizations take place by obtaining new investment in the enterprise [2] rather than by sales of assets that would produce money for the fund. The very reason that enterprises choose to seek new investment is that they want that investment for themselves, not for the fund. And, indeed, these actions based on their self-interest as perceived by the socially-owned enterprises strongly evidence what controls their decisions. Arguments based on the existence of statutory fund are groundless and, because of their modest role, largely irrelevant. I cannot agree with Mr. Newcomb's understanding that the fact of possible payment to the fund indicates government ownership of social assets.

The provisions of the two privatization laws actually confirm that the enterprises themselves control the key privatization decisions just as they make the economic decisions under the Law on Enterprises. These laws present a consistent whole, each describing and confirming the workers' and shareholders' power of management. The government has not, and does not, control Yugoslav enterprises.

I declare under penalty of perjury that the foregoing is true and accurate and that the attached documents are true copies of original documents retained in my custody.

/s/ Stephen B. Ives, Jr.
STEPHEN B. IVES, JR.

August 6, 1992

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[2] Deputy Prime Minister Kovac of the (new) Federal Republic of Yugoslavia told me personally on August 4, 1992 that, since enterprises choose their own privatization technique, 95% of all privatizations follow this route; he pointed out that enterprises wanted the investment to come to them, not to go to any outside fund.

APPENDIX N

STATEMENT

PART I

PERSONAL BACKGROUND

1. I, ZORAN MITIC, am a Yugoslav citizen. I hold a law degree from the University of Nis, Yugoslavia and Master of Laws Degree (LLM) from the University of London.

I have been employed by the firm of Constant & Constant, solicitors, London, England since January 1990. A short resume about my background and legal expertise is attached at the end of this Statement.

PART II

2. *LEGAL STATUS OF JUGOSLAVENSKA OCEANSKA PLOVIDBA ("Jugooceanija")*

2.1 Jugooceanija is a limited liability stock company by virtue of the 1988 Enterprise (Companies) Act, and internal workers resolutions. It is currently regulated by the Montenegro "Law on Ownership and Management Transformation" ("LOMT") (See attached original Yugoslav version together with an English translation). This law which came into effect in January 1992 is the Republican equivalent of the Federal Law on Social Capital (LSC).

2.2 Jugooceanija, Kotor owns and can deal with its assets as it thinks fit, free of any government (whether federal, republic or local) interference. Under its present Statutes recorded in the Court Commercial Registry, the General Manager has the final and controlling executive power.

2.3 The company may issue and sell shares and has in fact done so. This power is contained in Article 28 LOMT which I quote:

> "Article 28
>
> The Enterprise may issue and sell shares with a view to procuring additional capital to the employees of the Enterprise and the citizens of the Republic of Montenegro by virtue of the share issuing decision and the Programme enacted by the Enterprise's managing body.
>
> On the basis of social capital, the Enterprise may sell equity in the company and organize itself as a limited liability company."

The proceeds of any issue of any shares belong to the company.

I also quote Article 30 LOMT:

> "Article 30
>
> Proceeds from the sale of shares shall belong to the Enterprise."

2.4 In 1989, in consequence of the new legislation enacted in 1988-89 (see below) the physical assets of Jugooceanija (ships and office buildings etc.) were represented in its books, in its equivalent of a capital account, as "*social capital*" being derived from the earlier pre-1988 notion of property in "*social ownership*". However this "social capital" is now, by virtue of Resolutions and Statutes of the Company, in the process of being capitalised into ordinary share capital in private ownership.

2.5 This conversion and capitalisation is dealt with in Articles 17 to 27 of LOMT. Under the extremely preferential rules set out in these Articles, the employees of Jugooceanija have acquired, by deferred payments at a greatly discounted price, the share capital of Jugooceanija.

2.6 It is a profound misconception, (perhaps understandable given the quality of the drafting of Yugoslav legislative when compared with the legislation adopted in sophisticated capital economies) to conclude that there is any immediate or residual governmental ownership, whether federal, republic or municipal, of the assets of Jugooceanija, including in the circumstances of winding-up. It is simply not the case.

3. *GENERAL EXPLANATION OF LAW (AND ITS BACKGROUND) APPLICABLE TO JUGOOCEANIJA*

3.1 The concept of social ownership of business was unique to Yugoslavia. It could not be compared with the systems of the former Soviet Union and its then satellite countries. It created a local self-management system entirely independent of government control and ownership. The benefits and control of any business vested in the employees of the business from time to time. The same is true today under the new "capital" companies system.

3.2 *Stage 1 : 1945-1950*—All assets were owned by the State and governed by the State. All employees were employed by the State as well.

3.3 *Stage 2 : 1950-1963*—The Basic Law on Managing State Enterprises and Economic Associations by Working Collectives (Official Gazette of FNRY 43/50) *transforms the state ownership into social ownership by transferring (or alienating) irrevocably and unconditionally the state assets* to the business entities which the employees managed by themselves, and were entitled, as employees, to enjoy the full beneficial ownership. By virtue of the Constitution of 1953 various governmental agencies, departments or ministries ceased to have direct controls over enterprises' affairs. The Governmental role was restricted to its normal functions of legislator who sets out rules and regulations in the economy.

3.4 *Stage 3 : 1963-1974*—During this period, particularly by virtue of the Amendments to the Constitution 1963 the social ownership was extended to non-commercial legal entities such as utility companies (water, electricity, transport, etc.), and others such as education, health and similar.

3.5 *Stage 4 : 1974-1988*—The Yugoslav Constitution of 1974 provides a negative definition of the social ownership (see Mr. Vukmir's statement on page 1, footnote no. 4) I quote ". . . no one has the right of ownership to the social assets, no one—not social-political communities, nor organisations of associated labour or individuals . . ." Such negative definition obviously rules out the Government of any kind (local, Republican or Federal).

3.6 *Stage 5 : 1988-to-date*—The statutes entitled" Amendments to the Constitution of 1974" and various statutes such as the Enterprises Act and the Law on Social Capital fundamentally changed the concept of "ownership". Systems were established which permitted direct stockholding interests in such legal entity. The new basic system permitted the employees to become shareholders of freely transferable shares (enjoying an ordinary return of revenue and capital) in their employer company.

There may be issued two types of shares (a) so-called "internal shares" and (b) shares as a normal type of security. Internal shares are issued at a discount up to 70% (as provided by Article 1c, paragraph 2 of the LSC and Articles 20 and 22 of the LOMT) to a limited class of people principally to current or former employees. The decision on issuing internal shares is passed by the company. By issuing "internal shares" the social capital is reduced (Article 23 of the LOMT, Article 1g(2) of the LSC).

A company was permitted to raise additional capital by issuing ordinary shares in the usual manner as regulated by the Security Act 1989, i.e. the types of shares which can be issued in any other market economy legal

system. *It hardly need be said that "the resources acquired by additional investments belong to the company"* (Article 1, paragraph 1 of the LSC and Article 30 of the LOMT).

The company acquires new capital (i.e. cash or assets) in exchange for new shares issued to the contributor/ investor.

4. *THE FUND FOR DEVELOPMENT ("THE FUND")*

4.1 In two exceptional circumstances the proceeds of sale representing the transformed social capital of a company (but not the assets themselves) may pass to the Fund, rather than to the company.

These are:

(i) in an 'insolvent' liquidation (i.e. where liabilities exceed available assets) of a company, after payment of all creditors, the creditors would recover all the assets and there would effectively be nothing left for the Fund. It is very difficult to conceive of a "solvent" liquidation of a Company having social capital. I have never heard of this occurring. Such a liquidation would require a resolution of all employees and by passing such resolution the employees would effectively be putting themselves out of work. No one can require the employees to pass a resolution to liquidate a solvent company.

(ii) where the *whole* of the assets and undertakings of the company comprise social capital (ie all of the assets are social property and none has been capitalised), the company has no holding company, and all such assets and undertaking are sold to a third party, the proceeds go to the Fund. The provision is effectively never used because it is in the best interest of the buyer to subscribe for new share capital in an amount less than 100% of the company's total capital, thereby allowing the in-

vestment monies to stay in the company, for the investor's benefit and not to pass to the Fund. Distributable profits are paid to such investor in proportion to the investor's investment in the company and of course the investment is retained by the company. Companies such as JOP, which have chosen to transform this social capital by "issuing and selling shares in order to increase capital", and therefore any further sales will only further "increase capital" and the "proceeds from the sale of shares shall belong to the enterprise" (see Articles 10, 28-30 of LOMT). Therefore a third party can only invest in it thus reducing the proportion of the social capital and increasing the proposition of the private capital.

4.2 The Fund has a status of so-called "public enterprise" i.e. an enterprise which will serve public purposes such as a utility company. It was designated to be a sort of mutual fund, not an agency or department of the Government. The Fund is not owned by the Government. Such Fund is intended, as its basic object, to provide fresh resources for private businesses, whether by grant or loan or share capital, where possible to the former employees of the company or immediate community where such company was located.

5. *CONCLUSION*

There is a clear cut-off point between a company and any local, Republican or Federal Government. The enterprise is free and independent to manage, privatise or dispose of its assets. There is also a clear distinction between a social and state capital.

I declare under penalty of perjury of the law of the United States that the foregoing is true and accurate.

/s/ Zoran Mitic
ZORAN MITIC

Dated: 12th September, 1992

PART III

RESUME : ZORAN MITIC

1. Prior to my employment in this firm I graduated law in Yugoslavia in 1984 where subsequently I worked as an in-house counsel for a large Yugoslav multi-national company. In 1986 I moved to Great Britain where I studied law at the London University where I graduated in September 1989 with the title Masters of Law Degree—LLM. In the meantime, I have also passed solicitors qualification examinations in Yugoslavia and am currently doing the same equivalent in English law under the Rules and Regualtions of the Law Society of England and Wales.

2. My primary expertise on which I frequently advise British companies (including a major quoted company) lies in my knowledge of Yugoslav law, particularly Yugoslav company and banking legislation. I am in a permanent touch with legal developments in (former) Yugoslavia as I receive various legal journals, statues or official gazettes regularly. In addition, from time to time I publish articles on such legal developments in various legal journals. Thus, for the purpose of this statement I would mention "Foreign Investments in Yugoslavia—Recent Developments" published in the International Business Lawyer May 1990; the article "Privatisation—The Yugoslav Approach" published in the Eastern European Forum Newsletter, Volume 1, No. 1, the article "Banking Legislation in Yugoslavia: Recent Developments" published in the Butterworths Journal of International Banking and Financial Law and most recently a whole chapter on Yugoslav Business Law in the book "Wetgeving Oost—Europa Cids Voor de Onternemer", the book published by the Documentation Office for East European Law of the Leiden University, the Netherlands and commissioned by the Dutch Government. Furthermore, I speak from time to time at various conferences on Eastern European Legal and other developments. I am also an associate of the Chartered Institute of Arbitrators in London.

APPENDIX O

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Case No. 92-2535

Section "F"

MILENA SHIP MANAGEMENT COMPANY, LTD., SOUTH CROSS SHIPPING LTD., SOUTH ADRIATIC BULK SHIPPING LIMITED, AND GULF & EASTERN STEAMSHIP AND CHARTERING CORP.,

Plaintiffs

Versus

R. RICHARD NEWCOMB, DIRECTOR, OFFICE OF FOREIGN ASSETS CONTROL OF THE DEPARTMENT OF THE TREASURY, AND JAMES MURRAY, SENIOR SPECIAL AGENT, UNITED STATES CUSTOMS SERVICE,

Defendants

DECLARATION OF RUSSELL O. PRICKETT

My name is Russell Oliver Prickett. I am a U.S. citizen, born on May 18, 1932, in Willmar, Minnesota, and currently residing in Austin, Texas. I am a graduate of Hamline University (1954) and the Harvard Law School (1957). From 1959 until my retirement in 1986, I was employed as a Foreign Service Officer by the U.S. Department of State, specializing primarily in economic and business affairs.

For most of my professional life, dating from my undergraduate years and extending to the present time, I have pursued the study of the culture, language, and politico-economic system of Yugoslavia. During my foreign service career I served two tours of duty with the

American Embassy in Belgrade: from 1964 to 1968 as Commercial Attache, and from 1982 to 1985 as Chief of the Economic Section.

In those positions it was may duty and responsibility to become familiar with the Yugoslavian economic and business system and to provide reports and analyses of that system through Embassy channels to the U.S. Government in Washington. My reports were routinely incorporated in publications issued by U.S. Government agencies, including the Departments of State, Commerce, and Treasury, for the benefit of the American public and business and financial communities. It was also my responsibility to provide briefings on business opportunities, business conditions, and the business and economic system, including especially the Yugoslavian system of socially-owned businesses, to visiting U.S. business and professional people, bankers, and high-ranking U.S. Government officials, including members of Congress. One such briefing in the mid-1980s included then-Vice President Bush, Mrs. Bush and his then-assistant, Mr. Donald Gregg.

Over the years I have made countless presentations to U.S. business groups about the Yugoslavian economic system. In the late 1960s, as the representative of the U.S. Government, I chaired seminars in New York and Chicago for the American Management Association on doing business with Yugoslavia. I have been active since 1982 in the affairs of the U.S. Yugoslav Economic Council, recently re-named the U.S. Business Council for Southeastern Europe, and I am currently serving my second three-year term on the Council's board of directors.

Since retiring from the U.S. Foreign Service in 1986, I have been engaged on several occasions as a private consultant to provide expert advice on the Yugoslavian economic system, including specifically the transformation of socially-owned property to private ownership, and the effect of such transformation on Yugoslavian business

enterprises. I have maintained extensive contacts in the Yugoslavian government, business and banking communities, travelling regularly to the country, most recently in May of this year, with my next trip planned for October. I am the author, together with Professor John Lampe and Ljubisa Adamovic, of *Yugoslav-American Economic Relations Since World War II*, published in December, 1990, by the Duke University Press in Durham, North Carolina.

I believe that this background and experience equips me to speak with some authority on the subject of socially-owned businesses in Yugoslavia and the U.S. Government's knowledge and understanding thereof.

I have been retained in this case by the law firm of Chaffe, McCall, Phillips, Toler & Sarpy to render an opinion concerning whether its client, Jugoslovenska Oceanska Plovidba (J.O.P.) is owned or controlled by the Government of Yugoslavia, either by virtue of its history as a socially-owned enterprise or by virtue of its status as a shareholding company and mixed-ownership enterprise at the time of the President's Executive Orders 12808 of May 30, 1992, and 12810 of June 5, 1992, which orders "blocked" assets belonging to the Yugoslavian Government or its controlled entities. To perform my analysis, I have examined the following:

1) The Statute (By-Laws) of J.O.P. of September 1, 1989);

2) The registration to do business as a shareholding company granted by the District Commercial Court in Titograd on November 17, 1989;

3 The Enterprise Law;

4) The Social Capital Laws;

5) The Constitution of the Federal Republic of Yugoslavia;

6) Numerous other general provisions of Yugoslavian law; and

7) Government Exhibit No. 1, "Privatization in Yugoslavia," by Dr. Branko Vukmir of the U.N. Center on Transnational Corporations.

I have also examined the transcript from the preliminary injunction hearing and the decision rendered following the hearing which will assist me in focusing my comments concerning ownership and control as well as development funds and the issue of liquidation as it applies to enterprises in Yugoslavia.

The Yugoslav concept of social ownership is unique in the world. In a nutshell, socially-owned businesses in Yugoslavia are not owned by the state or the government, but they are not privately owned either. "Ownership," in a very vague sense, is considered in theory to reside in the whole society of Yugoslavia. The workers in any given enterprise, from the managing director to the janitor who sweeps out at night, exercise the powers of ownership through their elected "workers' councils," acting in effect as trustees for the society at large. I emphasize again, "social property" is not state property. Social ownership is not government ownership. These are the facts in Yugoslavia today, as they have remained, unchanged, in my experience and observation at least since 1964. Moreover, the U.S. Government and its several agencies, including at least the Departments of State, Commerce, and Treasury, have known and recognized these facts from that year to this. I know this to be the case because I myself have helped to establish that knowledge and recognition through my own reports and analyses as an official of the U.S. Government. I recall briefing the Bush party on this basic fact of "social ownership" during their visit to Yugoslavia in the mid-1980s, in the context of other discussions, principally on Yugoslavia's foreign debt and macro-economic performance.

Constitutional and legal provisions guarantee the independence of the workers' "self-management" of their enterprises, ruling out governmental control as well as government ownership. Applicable laws authorize the

workers in a socially-owned business, through their workers' councils, to sell or encumber its socially-owned property, and the law also provides for bankruptcy proceedings if the enterprise's obligations cannot be met. It does not identify any ownership or control interests in socially-owned property on the part of the state or the government. Expert observers in and outside Yugoslavia, in Western Europe and the United States, have long been agreed that the system of social ownership in Yugoslavia is more like private ownership in the West than like the state socialism of the former Soviet Union and the countries of Eastern Europe. The Department of Commerce's most recent publication on Yugoslavia, OBR 88-09, "Marketing in Yugoslavia," (see Attachment A) states on page 3: "Industry in Yugoslavia is almost entirely 'socially owned.' *The owner in question is not the state* but rather each company's workers collective, or 'self-management group' " (emphasis supplied).

Economic considerations, mainly efficiency and competition for foreign investment, led the Government of Yugoslavia to adopt legislation permitting the privatization of socially-owned businesses. It was under the first such law, the federal Enterprise Law of December 31, 1988, that J.O.P. adopted its current by-laws or "statute." This law enabled socially-owned businesses to pursue various routes to privatization. A firm could decide to sell partial shares in its ownership, or it could "sell itself" *in toto* to domestic or foreign purchaser(s). Several forms of business ownership were declared equal under the law, including complete social ownership, called a "socially-owned enterprise," complete private ownership, called a "private enterprise," and mixed—part social and part private—ownership, called a "mixed-ownership enterprise" (Enterprise Law, Article 2). In turn, a mixed-ownership enterprise could be founded as a "shareholding company," a "limited liability company," a "limited partnership company," or a "company with unlimited solidarity liability" (Article 81). J.O.P. chose

the first of these possibilities, and on November 17, 1989, it was registered as a shareholding company.

Please note that this registration did not by itself change the fact that J.O.P. was still a socially-owned enterprise. Registration as a joint-stock company simply allowed J.O.P. to issue new shares of stock in order to raise additional capital, which it did, thereby becoming a "mixed ownership enterprise." What was socially-owned before remained socially-owned, and the essential character of social ownership itself did not change. J.O.P.'s socially-owned property is still under the domain of J.O.P.'s workers, through their workers' council. What has changed is that some of the capital, i.e., the new capital, represented by the newly-issued shares of stock, is now privately owned. But it continues to be true to that no part of J.O.P. is the property of the Government of the Federal Republic of Yugoslavia, the Government of Serbia, or the Government of Montenegro, nor of their respective agencies, instrumentalities or controlled entities. Consequently, Executive Orders 12808 and 12810 do not apply to J.O.P.

I understand that the Court is concerned, in seeking to clarify the question of "social" versus "state" or "government" ownership, about (a) the disposition of proceeds in the event of liquidation of socially-owned enterprise; and (b) the character of "development funds" that have been established by law to receive the proceeds from the sale of enterprises in their entirety.

With respect to (a), there was historically no provision for disposing of residual assets after a bankruptcy proceeding, before the advent of privatization legislation in 1989 and 1990. This did not present problems in practice, because enterprises virtually never went into bankruptcy proceedings until or unless their liabilities far surpassed their assets, leaving no residual assets for disposition. It was assumed, and the constitution provided, that the enterprise would stay in business and continue to provide employment for its workers. In practice, enterprises

either merged their assets—and their workers, who were guaranteed lifetime employment—with other enterprises, or they would gradually sell off their assets to pay off their debts, which usually included back wages and salaries to their workers, and would cease operation when the balance sheet reached zero. In any case, the assets or their proceeds did not revert to the state or the government. This is still the most frequent case in bankruptcy proceedings, but since the development funds have been created in conjunction with the privatization process, the law now provides that social capital remaining after creditors have been satisfied in a bankruptcy case shall be transferred to the Development Fund. (Montenegro Law on Ownership and Management Transformation, Article 59.) I should stress that this discussion of the development funds is completely academic as far as J.O.P. is concerned. No assets connected with J.O.P., whether proceeds from the sale of stock or otherwise, have gone into these funds.

Yugoslav experience with the liquidation of enterprises, either with or without bankruptcy proceedings, does not raise the implication of state or government ownership of socially-owned property or capital. As explained more fully below, the fact that the development funds receive the proceeds of the sale of social capital under limited circumstances, such as liquidation, does not in any way change the essential character of social property. Rather, in the unlikely case of a solvent liquidation, the new law merely provides a vehicle for disposition of property that would formerly have had no identifiable owner. In a case where the enterprise no longer existed to serve as trustee of this particular social property, the new law would merely transfer the trusteeship responsibility to the fund. It must be stressed that neither the government nor the fund would have any control over the decision to liquidate, nor is there any mechanism by which the government or the fund could compel the company to liquidate its remaining assets. The decision to liquidate a

solvent enterprise and forfeit the residual assets to the fund is left entirely to the workers' council. For obvious reasons, this is a rarity in practice.

Concerning (b), the very existence of the development funds, their history, and their place in the legal framework of privatization, all militate *against* the notion that somehow the state or government has an ownership interest in property or capital by virtue of its social ownership. First, as Vukmir notes (Vukmir, page 9), neither the federal Yugoslav government nor the republic governments of Serbia or Montenegro moved to "capture" proceeds from privatization sales of social assets in order to meet their budgetary needs, which have been considerable. Observers are generally agreed that this reflects the views of those governments themselves that they were not and are not in any sense the "owners" of socially-owned businesses or their assets.

Second, as issues in privatizing socialist economies generally were being addressed during and after the collapse of socialism in the Soviet Union and Eastern Europe in the late 1980's, the unique Yugoslavian system of social ownership linked to "workers' self-management" posed both theoretical and practical problems for analysts and advisers in and outside of Yugoslavia. (See the writings of Harvard's Jeffrey Sacks and David Lipton, for example.) These experts recognized, as the U.S. Government had known for decades, that under Yugoslavian socialism, unlike all others, there was *no identifiable owner* of "socially-owned" companies. Any proposed program of privatization would therefore have to specify both what entity would have the authority to offer enterprises, or shares in enterprises, for sale, and what entity would be authorized to receive the proceeds.

The answer to the first question was implicit in the Yugoslavian system of self-management. The workers, through their workers' councils, were authorized to make this decision. To the second, both Yugoslavs and advisers

from other countries proposed a variety of answers. Some (see Vukmir, page 9, for example) even suggested that the government(s) take some share to help meet budgetary needs. Others, including Sacks, who was retained for a time by then-Prime Minister Markovic in 1990, suggested that a development fund could perform functions that would enhance business conditions and suitably benefit the society at large, to which in theory the assets had "belonged" all along. This was the course adopted in the Yugoslavian constitutional and legislative provisions authorizing the privatization of socially-owned enterprises.

If the government had been seen as the owner "all along," the government would logically receive the proceeds from the sale of social capital under all circumstances, which is clearly not the case. There would have been no need to provide a separate fund or separate mandate for the use of the proceeds. Instead it is clear that, by whomever managed (i.e., government or otherwise), the funds are to continue the historic role of the worker/self-managers as trustees of these assets for the society as a whole. In any case, as noted above, none of the proceeds from J.O.P.'s sales of shares have gone into any development fund. There are instances where the Yugoslavian Government has been buying shares of socially-owned businesses. This obviously creates a degree of state ownership, but the logical consequences is equally obvious: the unpurchased businesses are *not* owned by the state or government.

Finally, it has been suggested that the brief tenure of J.O.P.'s managing director, Captain Samardzic, as "Foreign Minister" of Montenegro might imply Montenegrin government control over J.O.P. This suggestion is not persuasive. The position was unpaid, mainly honorary, and of brief duration; it has since been eliminated. Captain Samardzic remained in charge of, and paid by, J.O.P. throughout his occupancy of the position. In my experi-

ence, such "revolving door" arrangements are not unheard-of in Yugoslavia, though less so there, perhaps, than in the U.S. Ante Markovic, the former Prime Minister who initiated sweeping free-market reforms, was one of the country's most successful industrialists as head of the Djuro Djakovic locomotive-manufacturing enterprise. As with Ross Perot's chairing of a Texas education commission, there is more likelihood that influence, if any, passes from the company to the government in such cases than vice versa.

The foregoing analysis of the facts and considerations bearing on this case, together with my knowledge and experience of the Yugoslavian economic system and the nature and history of social ownership in Yugoslavia, leads me to conclude that J.O.P. as a socially owned enterprise, recently constituted as a shareholding company of mixed private and social ownership, is neither owned nor controlled by the governments of Yugoslavia, Serbia, or Montenegro. As I pointed out above, agencies of the U.S. Government have long been aware of the fact that socially-owned enterprises in Yugoslavia are not owned or controlled by the Government of Yugoslavia. Publications of the Department of Commerce and anti-dumping determinations by Treasury give further evidence of this awareness. The article by Branko Vukmir cited by the Government clearly states that "Yugoslav enterprises were not considered as state enterprises and their property was not considered as state-owned property" (Vukmir, page 1). So it was in 1974, and so it has remained ever since.

The presumption by R. Richard Newcomb and the Treasury's Office of Foreign Assets Control that "All entities located or organized in Serbia and Montenegro are . . . owned or controlled by the Government of Yugoslavia" is therefore contrary to the facts as they exist in Yugoslavia and contrary to the U.S. Government's continuing knowledge and awareness of those facts. Treasury's order blocking the assets of all those entities there-

fore exceeded the mandate of Executive Orders 12808 and 12810. The President could have chosen to order the blocking of the assets of all such entities, but he did not. He ordered the blocking of assets only of those governments and their owned or controlled entities. As the U.S. Government has long been aware, "socially-owned" businesses in Yugoslavia do not fall in this category.

I declare under penalty of perjury that the foregoing is true and accurate to the best of my knowledge and belief.

Dated: 9/14/92

/s/ Russell O. Prickett
RUSSELL O. PRICKETT

APPENDIX P

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Case No. 92-2535

Section "F"

MILENA SHIP MANAGEMENT COMPANY, LTD., SOUTH CROSS SHIPPING LTD., SOUTH ADRIATIC BULK SHIPPING LIMITED, AND GULF & EASTERN STEAMSHIP AND CHARTERING CORP.,

Plaintiffs

Versus

R. RICHARD NEWCOMB, DIRECTOR OFFICE OF FOREIGN ASSETS CONTROL OF THE DEPARTMENT OF THE TREASURY, AND JAMES MURRAY, SENIOR SPECIAL AGENT, UNITED STATES CUSTOMS SERVICE,

Defendants

SUPPLEMENTAL DECLARATION OF
RUSSELL O. PRICKETT

The following is in response to the letter of September 18, 1992, to Captain Nikola Samardzic from Mr. R. Richard Newcomb, Director, Office of Foreign Assets Control, U.S. Department of the Treasury.

In Mr. Newcomb's letter, OFAC acknowledges the U.S. Government's recognition that Yugoslavian "social ownership" was not the same as government ownership—at least until 1988. But, OFAC states, ". . . the post-1988 legislation on privatization radically alters the prior system." In essence, it is asserted that these laws, written to promote the transfer of socially-owned enterprises into private hands, have actually had the opposite effect, con-

verting social ownership into state or government ownership. OFAC argues that because the privatization legislation created investment funds to receive proceeds from the sale of "social capital" and to apply those funds to certain dedicated uses, these laws negated the entire concept of social ownership, as distinct from government ownership, on which the Yogoslav economy has been based for several decades.

If such a radical effect were intended, it could have been explicitly stated, as one would expect. But no such language appears in any of the privatization laws. OFAC infers from the existence of an investment fund that the state is being "compensated" as the "owner" of social assets. This is by no means the only, or most reasonable, inference to be drawn. Far more consistent with the Yugoslavian reality—and with the language of the privatization statutes—is the concept that these investment funds are analogous to assets being placed in escrow as the result of a class action suit or a rate rebate to utility patrons. Such an analysis would not imply state ownership.

OFAC's reference to LOMT Article 49 as demonstrating "the pervasive role of the State in the economy" ignores the legal context of Article 49 in a law to promote privatization and the economic context of an economy bogged down with loss-making socially-owned enterprises. As Articles 50 and 51 make clear, the "takeover" of an enterprise referred to in Article 49 is for the sole purpose of transforming it "into a joint stock company or limited liability company without delay" and getting it into private hands as soon as possible.

The point is that workers in an unsuccessful enterprise have little incentive to prepare their company for sale to a private buyer or buyers who would try to make it operate efficiently or else sell off its assets and wind it up; either alternative threatens the workers' job security.

Article 49 describes precisely the kinds of enterprises that represent the "down side" of social ownership, and it provides "stick" incentives for them to move toward privatization. The existence of provisions such as these are no more indicative of government ownership or control than are Western laws authorizing condemnation proceedings in certain circumstances.

It should be noted that the links of so-called "pervasive influence" between the Communist Party and Yugoslavian business entities were substantially severed in the economic reforms of the 1960s. The practice of government or party appointment of enterprises' managing directors was abolished in 1969. Since that time workers have been free to reject and in fact do reject so-called "political" candidates as their managing directors. As I noted previously, the fact that Yugoslavian businessmen may do one or more tours of public service no more indicates government control over their businesses than would be the case in the U.S. None of these factors, therefore, provides reason to conclude that Yugoslavian socially-owned enterprises are under the ownership or control of the Government of Yugoslavia.

I declare under penalty of perjury that the foregoing is true and accurate to the best of my knowledge and belief.

/s/ Russell O. Prickett
RUSSELL O. PRICKETT

Dated: 9/24/92

APPENDIX Q

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

C.A. No. 92-2535

Section "F"

MILENA SHIP MANAGEMENT COMPANY, LTD., *et al.*,
Plaintiffs

v.

R. RICHARD NEWCOMB, *et al.*,
Defendants

AGENCY DECISION

DEPARMENT OF THE TREASURY
WASHINGTON

September 18, 1992

FAC No. Y-128743

Dear Captain Samardzic:

This letter responds to your application on behalf of Milena Ship Management Company Ltd. ("Milena"), originally dated July 6, 1992, requesting that the Office of Foreign Assets Control unblock and permit the normal operation of five vessels, now detained in U.S. ports, which were recently reflagged in Malta and are managed by Milena. Milena and the vessel-owning companies are Maltese subsidiaries of Jugoslavenska Oceanska Plovidba, a "mixed-ownership shareholding company" located in

Kotor, Montenegro ("JOP"). Montenegro (with Serbia) is a constituent republic of the unrecognized Federal Republic of Yugoslavia ("Yugoslavia"), and is subject to Presidential blocking orders and a comprehensive sanctions program contained in Executive Orders 12808 of May 30, 1992, and 12810 of June 5, 1992. Based on a full review of the administrative record (detailed below), including information provided to this Office and in court proceedings by or on behalf of Milena, and guidance received by the United States from the United Nations Security Council Committee established pursuant to resolution 724 (1991) (the "UN Sanctions Committee"), Milena's application for a license is hereby denied.

The vessels, the M/V ZETA, M/V KAPETAN MARTINOVIC, M/V MOSLAVINA, M/V DURMITOR and M/V LOVCEN, were blocked as property in which the Government of Yugoslavia has an interest, based upon the published presumption of this Office that all entities located or organized in Serbia and Montenegro, and their foreign subsidiaries, are owned or controlled by the Government of Yugoslavia. After a thorough review of your application for unblocking of the vessels, dated July 6, 1992, as supplemented by the submissions of counsel dated July 10 and July 22, your second request for unblocking dated August 22, the transcript of your Motion For Temporary Restraining Order of August 7, 1992, before the Honorable Martin L.C. Feldman, United States District Judge for the Eastern District of Louisiana ("Transcript"), and the submission of counsel dated September 4, 1992, as well as the various filings made by the plaintiffs in that action, including those made in support of the recent Motion for Summary Judgment, we conclude that you have failed to rebut our presumption of Yugoslav government ownership or control. You have failed to demonstrate that JOP is now substantially privatized under applicable law, whereby private funding would substantially outweigh "social capital" in JOP's capital

structure. We further note that, in your simultaneous service as Foreign Minister of Montenegro and Managing Director of JOP and its subsidiaries, it is impossible to extricate your government and private roles in your management of these businesses, including decisions to reflag the vessels in question in Malta well after the June 1991 commencement of hostilities in the former Yugoslavia and the start of public discussion of international sanctions. Finally, and of great importance in our international coordination of sanctions against Yugoslavia through the United Nations, we must deny your application to conform U.S. sanctions practice to the August 28, 1992 ruling of the UN Sanctions Committee that operation of these vessels by Milena would violate the UN sanctions under Security Council Resolution 757.

I. Blocking of Milena's Vessels

Economic sanctions against Yugoslavia were imposed by the President pursuant to the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-06 ("IEEPA"), on May 30, 1992, in Executive Order 12808, and on June 5, 1992, in Executive Order 12810, pursuant to IEEPA and the United Nations Participation Act, 22 U.S.C. § 287c ("UNPA"), as a result of its Government's involvement in and support for groups attempting to seize territory in Croatia and Bosnia-Hercegovina by force and violence. Executive Orders 12808 and 12810 (the "Executive Orders") blocked, or froze, all *property or interests in property* of the Government of Serbia, the Government of Montenegro, and the Government of Yugoslavia, their agencies, instrumentalities and *controlled entities*, or property or interests in property held in the name of the Government of the former Socialist Federal Republic of Yugoslavia ("SFRY") or the Government of Yugoslavia, that on or after May 30, 1992, were or came within the United States or within the possession or control of U.S. persons.

The Customs Service, acting upon information and instructions from OFAC that JOP was the ultimate owner of ships entering U.S. ports under the Maltese flag, detained four ships as being subject to the blocking provisions of the Executive Orders: the MV/V ZETA and the M/V MOSLAVINA in the Port of New Orleans, and the M/V KAPETAN MARTINOVIC and the M/V DURMITOR in the ports of Savannah and Baltimore. The M/V ZETA and the M/V DURMITOR are owned by South Cross Shipping Ltd. ("South Cross"), formerly Montenegro Ocean Shipping Company, Ltd., organized under the laws of Malta. The M/V MOSLAVINA and the M/V KAPETAN MARTINOVIC are owned by South Adriatic Bulk Shipping Limited ("South Adriatic"), also organized under the laws of Malta. Both South Cross and South Adriatic are beneficially owned by Boka Ocean Shipping Company ("Boka"), organized under the laws of Liberia. Boka is in turn owned by JOP. All of the above mentioned vessels, as well as the M/V LOVCEN which arrived in U.S. port after the other vessels, are managed and controlled by Milena, which operates and manages the vessels from Malta. Milena is wholly owned by Boka. JOP and all of its affiliates are considered by this Office to be "controlled entities" of the Government of Yugoslavia, for purposes of the Executive Orders, and any property in which JOP has an interest, including the vessels, that come within the jurisdiction of the United States are blocked.

II. Sanctions Committee Ruling.

On August 6, the United States Government requested guidance from the UN Sanctions Committee, established pursuant to United Nations Security Council Resolution 724 (1991) to oversee international coordination of the UN sanctions against Yugoslavia, on whether the vessels in question may engage in international shipping activities and whether resources may be transferred or payments made to the vessel's owners. (Copy included as

Enclosure 1.) The UN Sanctions Committee had earlier advised Belgium that the continued operation of a vessel belonging to Bar Overseas Shipping Ltd. of Malta, in turn owned by majority interests in Montenegro, and any payments related thereto, would be in violation of the sanctions established under UN Security Council Resolution 757 (1992).

On August 28, 1992, the Committee responded to the United States with an identical ruling. (Copy included as Enclosure 2). While the Committee's response does not cite the provision of Security Council Resolution 757 upon which it relies, paragraph 5 appears to be the basis for its decision. Paragraph 5 states, in pertinent part:

> [a]ll States shall not make available to . . . any commercial . . . undertaking in the Federal Republic of Yugoslavia (Serbia and Montenegro), any funds or any other financial or *economic resources* and *shall prevent* their nationals and *any persons within their territories from removing from their territories or otherwise making available* to . . . any such undertaking any *such funds or resources* . . . . (emphasis added)

Sections 1, 2(f) and 2(g) of Executive Order 12810 implement paragraph 5 of Resolution 757 under the authority of both the UNPA and IEEPA. Section 2(g) prohibits:

> any commitment or transfer, *direct or indirect*, of funds, or other financial or *economic resources* by any United States person to or for the benefit of the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) or any other person in the Federal Republic of Yugoslavia (Serbia and Montenegro). (Emphasis added.)

We therefore interpret the UN Sanctions Committee ruling to mean that the release of the vessels would constitute a prohibited transfer of an economic resource both

to the Government of Yugoslavia and to a "person" within Yugoslavia, namely, JOP. Even if JOP were not subject to the presumption of Yugoslav government ownership and control, the release of the vessels to Milena, and hence to JOP, would be precluded pursuant to the prohibition against the transfer of economic resources to "persons" within Yugoslavia.

III. Yugoslav Law

The inclusion of JOP on the list of entities presumed to be owned or controlled by the Government of Yugoslavia, issued on July 6, 1992 as General Notice No. 1, was premised upon our understanding of the Yugoslav economy in the weeks following the President's declaration of a national emergency with respect to Serbia and Montenegro. This understanding has been confirmed by the resources available to us that have provided the basis for this agency ruling, including an article by B. Yukmir entitled "Privatization in Yugoslavia," (UN Center for Transnational Corporations, Sept. 20, 1990, hereinafter "Vukmir"), and three statements provided on behalf of Plaintiffs by the following persons: Stephen B. Ives, Jr. (Declaration of Stephen B. Ives, Jr., hereinafter "Ives," Exhibit 5 to Plaintiff's September 14, 1992 Memorandum 1992, hereinafter "August 22 Application"); Zoran Mitic (Statement of September 12, 1992, hereinafter "Mitic," Exhibit 5 to Plaintiff's September 14, 1992 Memorandum in Support of Motion for Summary Judgment (hereinafter "Pl. 9/14/92 Memorandum"); and Russell O. Prickett (September 14, 1992 Declaration, hereinafter "Prickett," Exh. 6 to Pl. 9/11/92 Memorandum).

This Office does not contend that the Yugoslav economy was modeled on the Soviet system of the centralized "command economy," and has reviewed information provided by Milena and others indicating that the SFRY purported to establish a unique system of "socially-owned" enterprises that were managed by workers' councils. It is our

understanding that the workers' councils were composed of candidates typically selected by the Yugoslav League of Communists, then the ruling party of the SFRY and predecessor to the current ruling parties in Serbia and Montenegro. (August 3, 1992 Declaration of R. Richard Newcomb, Exhibit 9 to the August 22 Application, ¶ 5.) Even Mr. Ives admits to the role of the Yugoslav League of Communists in approving the appointment of a general director of an enterprise, although he states that such involvement was "extra-legal and informal." (Ives at 7.)

In 1989, ostensibly to increase productivity and raise new sources of capital, the Government of the SFRY entacted statutes permitting the sale of shares in socially-owned" firms. (The Enterprises Law, Exhibit 18 to Plaintiff's Memorandum in Support of Temporary Restraining Order. An English translation of the Law on Social Capital was obtained independently, and we have included a copy as Enclosure 3.) These laws were designed to transform corporations from socially-owned enterprises to mixed enterprises, involving both social and private ownership.

At the center of the presumption of Yugoslav government ownership or control is the statutory government interest in the proceeds of "social capital" when an entity is privatized. We find this interest to be clearly stated in the English translations of both the federal Law on Social Capital and the Montenegrin Law on the Transformation of Management (hereinafter "LOMT," Exhibit 6 to the August 22 Application). Both have numerous references to payment of the proceeds from the sale of "social capital" to several governmental-established funds.

Under the Law on Social Capital, if the "social capital" is sold, the proceeds are to be deposited into development "Funds" established by the governments of each republic. Mr. Ives recognized that the Funds "appear to be an arm of government." Ives at 11. According to Vukmir, the proceeds of the sale of shares representing "social capital" are "considered as assets which the respective republic has

permanently invested into the Fund." Vukmir at 2. Vukmir further states that the Law on Social Capital provides for "Agencies for Restructuring and Recapitalization" to be established in all the republic with the responsibility for ensuring a fair price for the sale of "social capital." Vukmir at 7-8, 11. If an enterprise opts only to increase its capital base by issuing shares in order to acquire additional capital, it may keep the proceeds of such sales. Vukmir at 9. Investors who are allowed to purchase their shares in "social capital" on the installment plan forfeit the unpaid shares in the event of default (whereupon society reacquires its claims—exercisable ultimately by the government—on that share in the "social capital" of the enterprise).

As we understand both the theory and the text of the laws provided to this Office, they establish a system of share sales on two tracks. The first track, set out in chapter 1 of Part II of the LOMT (we find earlier federal laws analogous), involves privatization of "social capital." In this track, private persons—typically employees—substitute their private capital for the existing "social capital" of the enterprise. No increase in the firm's overall capital occurs, since the purchaser is effectively buying out the societal interest in existing capital, rather like a secondary market purchase of shares. Instead, the purchaser's payment is washed through to the society—represented, as in most countries, by the government—to funds mandated by law and created by the Government of Montenegro to accomplish governmental purposes: government lending for privatization, public investment in troubled firms, investments for pension plans, and unemployment and retraining programs. *See, e.g.*, LOMT arts. 37 (3d ¶) & 45.

The second track, apparently the exclusive track utilized by JOP, is comparable to a primary share offering, and is governed by chapter 2 of Part II of the LOMT. Here, the investors' funds are added to the existing capital and new shares are issued. The societal interest in the com-

pany is not affected because the investor is not receiving an ownership interest in the "social capital" used in the business, and the proceeds of the share sale stay with the enterprise. LOMT arts. 28 & 30.

In either track, if the purchaser receives a discount on the shares' value (an incentive to privatize offered by law to the enterprise and the investor), that discount is deducted from the value of the "social capital" left in the enterprise. LOMT arts. 23 & 29. That partial write-off of the society's claim on the socially-owned assets of the enterprise represents the government's (society's) subsidy to the enterprise (passed on to the investor) for privatizing.

For purposes of determining governmental control, the salient feature of these laws is that they create a closed system in which "social capital" used by an enterprise ultimately gives rise to compensation to the government, for use in its performance of governmental functions, whenever that "social capital" passes into private ownership. While Milena's experts all cite Communist-era theory that the government has no ownership claim to "social capital," including U.S. Government findings that Yugoslav socially-owned enterprises should not be treated like state trading companies in non-market economies, we believe that the post-1988 legislation on privatization radically alters the prior system. When "social capital" was the only capital in large enterprises, in a system of worker self-management, there was no need to determine specific title or representation rights for capital. Privatization required a determinaiton of who *owned* "social capital," to determine who would be compensated for it when sold, and how that "social capital" would be represented in management decisions. The government could have determined to simply privatize "social capital" in place, transforming worker-managers into worker-owners and privatizing overnight. That was not done. Instead, the government determined legislatively that society was to be compensated for its prior investment in enterprises through its only representative—the State. And separate

representation rights would be given to "social capital," either through worker representation or "outside experts." *See, e.g.*, Law on Social Capital, arts. 3 & 122.

In our view, residual governmental claims on a majority of a Yugoslav enterprise's capital is all that is required to bring the enterprise within the scope of the blocking provisions of the Executive Orders. Insofar as State control of Yugoslav enterprises is concerned, while not overt as in the Soviet model, we believe that the permeation of members of the ruling Socialist party (successor to the Yugoslav League of Communists) through both the government and the economy, as well as the obvious role of the State in determining the disposition of the proceeds of the sales of shahes of "social capital" nonetheless results in the conclusion that the State, as the representative of society, remains the *de facto* owner of Yugoslav "social capital."

IV. Status of JOP Under Yugoslav Law

With regard to JOP specifically, you have admitted both in your submissions to this Office and to the Court that JOP has not completed its privatization process. (Exhibit 15 to August 22 Application; Transcript at 90, 114.) You assert that none of the proceeds of the sales of shares in JOP have been deposited into a development Fund, since JOP began to privatize under the Enterprise Law before the Funds were established pursuant to the Law on Social Capital (Letter of September 4 at 2). The proceeds from the issuance of shares have been retained by JOP itself pursuant to Article 19 of the company's "Statutes." (Exhibit 12 to August 22 Application; letter of September 4 at 2; Transcript at 58.) That indicates that the shares which have been issued are intended to create additional capital, and that JOP's "social capital" remains untouched. As stated previously, we regard the ownership and control of such "social capital" to reside ultimately with the State.

As noted above, we have also reviewed the LOMT. This law discusses the role of the Development Fund, granting the Fund the power to assign the management of the privatized company to domestic or foreign legal entities or natural persons. LOMT art. 44. The law also provides for the takeover of a Montenegrin enterprise under various circumstances, including cases in which the enterprise sustains a business loss according to its annual balance sheet. LOMT art. 49. We note, in this context, your statement that the sanctions threaten your ability to make current payments to banking creditors. August 22 Application at 12. We find that this law only further demonstrates the pervasive role of the State in the economy and in supervising the disposition of the "social capital."

We do not find the statements of Messrs. Ives, Mitic and Pricket on Yugoslav and Montenegrin law dispositive of the existence or nonexistence of a blockable government interest in the vessels, through JOP. None of these experts indicates familiarity with the status of the "privatization" of JOP—*i.e.*, with the relative percentages of private capital and "social capital" comprising JOP's capitalization—and Milena has failed to provide any information on this subject beyond vague statements that the privatization process is not complete. Indeed, at the purely theoretical level, Messrs. Mitic and Prickett draw opposing conclusions as to whether share sales by JOP to its workers do or do not affect the "social capital" of JOP.

Mr. Mitic first states that JOP can and has issued shares under powers granted in LOMT article 28, and that the proceeds of such sales are kept by the company under LOMT article 30. Mitic, at ¶¶ 2.3 & 3.6. Articles 28 through 30 of the LOMT comprise, a chapter of Part II of the law entitled: "2. Issuing and selling shares in order to increase capital (Recapitalization with Discount)."

Mr. Mitic further states that:

> [JOP's] "social capital" is now, by virtue of Resolutions and Statutes of the Company, in the process of being capitalized into ordinary share capital in private ownership.

Mitic at ¶ 3.4. He states that JOP's conversion from socially-owned to private capital is covered by LOMT articles 17 through 27, which comprise a separate chapter entitled: "1. Issuing and selling of shares in order to sell social capital, with discount." Mitic ¶ 2.5. He does not indicate there the disposition of the proceeds of the sale of these shares, although article 24 of that chapter states:

> Proceeds collected through sale of the shares shall immediately be paid into the Development Fund and other funds in the proportion established by law, or into the holding company.

There is no indication in the record that any holding company is involved in the privatization of JOP, and we must conclude that the proceeds of any JOP shares in "social capital" under chapter 1 of Part II of the LOMT are payable to the Development Fund and other funds established by the Montenegrin government. Mr. Mitic states that:

> Under the extremely preferential rules set out in these Articles, the employees of [JOP] have acquired, by deferred payments at a greatly discounted price, the share capital of [JOP].

Mitic at ¶ 2.5.

Mr. Prickett disagrees with Mr. Mitic's statements that JOP has been converting "social capital" into private capital. He states:

> Please note that this registration [of JOP as a shareholding company] did not by itself change the fact that J.O.P. was still a socially-owned enterprise. Registration as a joint-stock company simply allowed J.O.P. to issue new shares of stock in order *to raise additional capital,* which it did, thereby becoming a

> "mixed ownership enterprise." *What was socially-owned before remained socially-owned,* and the essential character of social ownership itself did not change. J.O.P.'s socially-owned property is still under the domain of J.O.P.'s workers, through their workers' council. *What has changed is that some of the capital, i.e., the new capital, represented by the newly-issued shares of stock, is now privately owned.* (Emphasis added.) . . .

Prickett, at p. 7. In other words, Prickett's statement indicates that no share sales representing "social capital" have been carried out under chapter 1 of Part II of the LOMT, but that all share sales have been to raise new capital under chapter 2 of that Part. While the declaration of Mr. Ives does not address whether any privatization of "social capital" has occurred at JOP through share sales, he indicates that capital increases that avoid payment into government-established funds are "the route that most enterprises have chosen. It is similar to the method JOP took under the Law on Enterprises, even before there was a privatization law." Ives at 11. We find Mr. Prickett's and Mr. Ives' statements consistent with the language of articles 17 through 19 of JOP's Statutes, which appear only to authorize share sales to increase capital, not to privatize JOP's "social capital." Exhibit 7 to Pl. 9/14/92 Memorandum.

We also find that the plain language of the LOMT and earlier federal laws contradict the statement of Mr. Mitic that proceeds for share sales go into the government-established funds only in the case of either an "insolvent liquidation" or a full buy-out by a third party. Mitic at ¶ 4.1; cf. LOMT art. 24 (quoted above). We also find we have reason to question the objectivity of Mr. Mitic's expert statement, given that his employer, Constant & Constant, is London counsel to South Cross Shipping—owner of the blocked M/V ZETA and M/V DURMITOR

and a plaintiff in the pending litigation. *See* Letter of July 3, 1992 from Hill Samuel Bank, August 22 Application, Exhibit 5.

Regarding your own testimony during the Preliminary Injunction Hearing in New Orleans, your responses to the Court's questions concerning the hypothetical liquidation of JOP during the hearing confirm the basis for our inclusion of JOP in the list of Yugoslav entities subject to the Executive Orders. When the Court inquired about the disposition of the assets of JOP if the company were liquidated, assuming an overall value of $200 million, you were unable to account for the disposition of the remaining $70 million once the company's debts and its 1,400 shareholders were paid. First you stated that the shareholders would receive the remainder, then corrected yourself to indicate that the $70 million would belong to the employees of JOP, only to reverse yourself again and state that the money would go to the shareholders. Finally, you admitted that there would "probably be some problem" regarding the Government's claim to the money. (Transcript at 116-117.) Article 8 of the Social Capital Circulation and Management Law, attached as Exhibit C to Mr. Ives' Declaration, states that in the event of liquidation, the remainder of the value shall be transferred to the Fund as a permanent share of the republic in the Fund.

We therefore find nothing that indicates any reduction in the "social capital" of JOP through share sales, nor that indicates that "social capital" constitutes less than a majority of the overall capitalization of the company. This is of particular concern when global economic sanctions are applied to Serbia and Montenegro, because of the economic and political pressure placed on a target government to utilize its leverage over business enterprises to procure violations of the sanctions. It is in this sanctions context that OFAC's presumption (confirmed in this case)

of government ownership or control of entities located or organized in Serbia or Montenegro.

In addition, we view your own professional career as a high level government official and Chairman and Managing Director of both JOP and Milena (Transcript at 75-76) as an example of the "extra-legal and informal" relationship between the government and the economic sector referred to by Mr. Ives in his Declaration. Between March 1989 and May 1992, you served concurrently as both Chairman and Managing Director of JOP and Foreign Minister of Montenegro. (Transcript at 112.) You have also stated that you were a representative of the Yugoslav Chamber of Economy in Australia, which you allege was not a government-controlled agency. (Transcript at 78.) This flies in the face of the Presidential determination set forth in § 4(c) of Executive Order 12808 and § 5(c) of Executive Order 12810, wherein the President specifically includes the Yugoslav Chamber of Economy within the definition of the Government of Yugoslavia. We note that when the State Department ordered the Yugoslav consulate in New York to close, the same space was occupied by representatives of the Yugoslav Chamber of Economy who were also required to vacate.

V. Conclusion

The purpose underlying the sanctions imposed in Security Council Resolution 757 and Executive Orders 12808 and 12810 is to pressure the Government of Yugoslav to cease its support for the seizure of territory by force and violence in the independent republic of Croatia and Bosnia-Herecegovina, and its support for and participation in the dismemberment and "ethnic cleansing" of Bosnia-Herecegovina. This Office's role is to implement the international sanctions and enforce the provisions of the Executive Orders to the fullest extent of the law. Our detaining and blocking the vessels managed by Milena and ulti-

mately owned by JOP is supported by the record before us and is within our lawful scope of authority as delegated by the Secretary of the Treasury. For these reasons, your application is denied.

We have attempted to mitigate the hardship imposed upon Milena and associated parties to the greatest degree possible, by permitting (1) the release of cargo aboard blocked vessels to U.S. consignees; (2) Gulf and Eastern Steamship and Chartering Corporation ("G & E") to act as U.S. agent for Milena to pay crews' wages, vessel maintenance expenses, and all outstanding debts which G & E is legally obliged to pay on Milena's behalf, both from blocked and unblocked sources; and (3) the transfer of cargo aboard other Milena vessels offshore to non Yugoslav-owned vessels before entry into U.S. waters. (Copies included as Enclosures 4, 5, and 6).

As you have pointed out in your submissions, our policy favors preserving and enhancing the value of blocked assets as a means of increasing the President's foreign policy leverage over the target governments. We would therefore be happy to discuss with Milena a means, consistent with the sanctions, to ensure the vessels' maintenance or the maintenance of the value they represent. For example, we have already licensed G & E to use funds for this purpose from blocked or unblocked sources. If this is not economically feasible, we could also entertain the option of liquidating the vessels and placing the proceeds into a blocked interest-bearing account in the United States, or perhaps authorizing the vessels to operate under bare boat charters, free from any Milena or Yugoslav operational control or interest, if the proceeds due the owners or charterer can verifiably be deposited into blocked interest-bearing accounts subject to U.S. jurisdiction. We await your comments and proposals on these or other options. Please do not hesitate to contact me (202/622-2510) on these matters.

Sincerely,

/s/ R. Richard Newcomb
R. RICHARD NEWCOMB
Director
Office of Foreign Assets Control

Capt. Nikola J. Samardzic
Chairman and Managing Director
Milena Ship Management Co. Ltd.
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APPENDIX R

UNITED STATES CONSTITUTION

U.S. Const. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

FEDERAL STATUTES INVOLVED

5 U.S.C. § 702. Right of Review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided,* That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dis-

miss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 392; Pub.L. 94-574, § 1, Oct. 21, 1976, 90 Stat. 2721.

5 U.S.C. § 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperable, for an appeal to superior agency authority.

Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 392.

5 U.S.C. § 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 393.

50 U.S.C. § 1701. Unusual and extraordinary threat; declaration of national emergency; exercise of Presidential authorities

(a) Any authority granted to the President by section 1702 of this title may be exercised to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat.

(b) The authorities granted to the President by section 1702 of this title may only be exercised to deal with an unusual and extraordinary threat with respect to which a national emergency has been declared for purposes of this chapter and may not be exercised for any other

purpose. Any exercise of such authorities to deal with any new threat shall be based on a new declaration of national emergency which must be with respect to such threat.

(Pub.L. 95-223, Title II, § 202, Dec. 28, 1977, 91 Stat. 1626.)

50 U.S.C. § 1702. Presidential authorities

(a)(1) At the times and to the extent specified in section 1701 of this title, the President may, under such regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit—

(i) any transactions in foreign exchange,

(ii) transfers of credit or payments between, by, through, or to any banking institution, to the extent that such transfers or payments involve any interest of any foreign country or a national thereof,

(iii) the importing or exporting of currency or securities; and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest;

by any person, or with respect to any property, subject to the jurisdiction of the United States.

(2) In exercising the authorities granted by paragraph (1), the President may require any person to keep a full record of, and to furnish under oath, in the form of reports or otherwise, complete information relative to

any act or transaction referred to in paragraph (1) either before, during, or after the completion thereof, or relative to any interest in foreign property, or relative to any property in which any foreign country or any national thereof has or has had any interest, or as may be otherwise necessary to enforce the provisions of such paragraph. In any case in which a report by a person could be required under this paragraph, the President may require the production of any books of account, records, contracts, letters, memoranda, or other papers, in the custody or control of such person.

(3) Compliance with any regulation, instruction, or direction issued under this chapter shall to the extent thereof be a full aquitance and discharge for all purposes of the obligation of the person making the same. No person shall be held liable in any court for or with respect to anything done or omitted in good faith in connection with the administration of, or pursuant to and in reliance on, this chapter, or any regulation, instruction, or direction issued under this chapter.

(b) The authority granted to the President by this section does not include the authority to regulate or prohibit, directly or indirectly—

(1) any postal, telegraphic, telephonic, or other personal communication, which does not involve a transfer of anything of value;

(2) donations, by persons subject to the jurisdiction of the United States, of articles, such as food, clothing, and medicine, intended to be used to relieve human suffering except to the extent that the President determines that such donations (A) would seriously impair his ability to deal with any national emergency declared under section 1701 of this title, (B) are in response to coercion against the proposed recipient or donor, or (C) would endanger Armed Forces of the United States which are engaged in hostilities or are in a situation where imminent involve-

ment in hostilities is clearly indicated by the circumstances, or

(3) the importation from any country, or the exportation to any country, whether commercial or otherwise, of publications, films, posters, phonograph records, photographs, microfilms, microfiche, tapes, or other informational materials, which are not otherwise controlled for export under section 2404 of the Appendix to this title or with respect to which no acts are prohibited by chapter 37 of Title 18.

(Pub.L. 95-223, Title II, § 203, Dec. 28, 1977, 91 Stat. 1626; Pub.L. 100-418, Title II, § 2502(b)(1), Aug. 23, 1988, 102 Stat. 1371.)

5 U.S.C. § 1703. Consultation and reports

(a) Consultation with Congress

The President, in every possible instance, shall consult with the Congress before exercising any of the authorities granted by this chapter and shall consult regularly with the Congress so long as such authorities are exercised.

(b) Report to Congress upon exercise of Presidential authorities

Whenever the President exercises any of the authorities granted by this chapter, he shall immediately transmit to the Congress a report specifying—

(1) the circumstances which necessitate such exercise of authority;

(2) why the President believes those circumstances constitute an unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States;

(3) the authorities to be exercised and the actions to be taken in the exercise of those authorities to deal with those circumstances;

(4) why the President believes such actions are necessary to deal with those circumstances; and

(5) any foreign countries with respect to which such actions are to be taken and why such actions are to be taken with respect to those countries.

(c) Periodic follow-up reports

At least once during each succeeding six-month period after transmitting a report pursuant to subsection (b) of this section with respect to an exercise of authorities under this chapter, the President shall report to the Congress with respect to the actions taken, since the last such report, in the exercise of such authorities, and with respect to any changes which have occurred concerning any information previously furnished pursuant to paragraphs (1) through (5) of subsection (b) of this section.

(d) Supplemental requirements

The requirements of this section are supplemental to those contained in title IV of the National Emergencies Act [50 U.S.C.A. § 1641].

(Pub.L. 95-223, Title II, § 204, Dec. 28, 1977, 91 Stat. 1627.)

5 U.S.C. § 1704. Authority to issue regulations

The President may issue such regulations, including regulations prescribing definitions, as may be necessary for the exercise of the authorities granted by this chapter. (Pub.L. 95-223, Title II, § 205, Dec. 28, 1977, 91 Stat. 1628.)

5 U.S.C. § 1705. Penalties

(a) A civil penalty of not to exceed $10,000 may be imposed on any person who violates any license, order, or regulation issued under this chapter.

(b) Whoever willfully violates any license, order, or regulation issued under this chapter shall, upon convic-

tion, be fined not more than $50,000, or, if a natural person, may be imprisoned for not more than ten years, or both; and any officer, director, or agent of any corporation who knowingly partcipates in such violation may be punished by a like fine, imprisonment, or both.

(Pub.L. 95-223, Title II, § 206, Dec. 28, 1977, 91 Stat. 1628, as amended Pub.L. 102-393, Title VI, § 629, Oct. 6, 1992, 106 Stat. 1773; Pub.L. 102-396, Title IX, § 9155, Oct. 6, 1992, 106 Stat. 1943.)

5 U.S.C. § 1706. Savings provisions

(a) Termination of national emergencies pursuant to National Emergencies Act

(1) Except as provided in subsection (b) of this section, notwithstanding the termination pursuant to the National Emergencies Act [50 U.S.C.A. § 1601 et seq.] of a national emergency declared for purposes of this chapter, any authorities granted by this chapter, which are exercised on the date of such termination on the basis of such national emergency to prohibit transactions involving property in which a foreign country or national thereof has any interest, may continue to be so exercised to prohibit transactions involving that property if the President determines that the continuation of such prohibition with respect to that property is necessary on account of claims involving such country or its nationals.

(2) Notwithstanding the termination of the authorities described in section 101(b) of this Act, any such authorities, wihch are exercised with respect to a country on the date of such termination to prohibit transactions involving any property in which such country or any national thereof has any interest, may continue to be exercised to prohibit transactions involving that property if the President determines that the continuation of such prohibition with respect to that property is necessary on account of claims involving such country or its nationals.

(b) Congressional termination of national emergencies by concurrent resolution

The authorities described in subsection (a)(1) of this section may not continue to be exercised under this section if the national emergency is terminated by the Congress by concurrent resolution pursuant to section 202 of the National Emergencies Act [50 U.S.C.A. § 1622] and if the Congress specifies in such concurrent resolution that such authorities may not continue to be exercised under this section.

(c) Supplemental savings provisions; supersedure of inconsistent provisions

(1) The provisions of this section are supplemental to the savings provisions of paragraphs (1), (2), and (3) of section 101(a) [50 U.S.C.A. § 1601(a)(1), (2), (3)] and of paragraphs (A), (B), and (C) of section 202(a) [50 U.S.C.A. § 1622(a)(A), (B), and (C)] of the National Emergencies Act.

(2) The provisions of this section supersede the termination provisions of section 101(a) [50 U.S.C.A. §1601 (a)] and of title II [50 U.S.C.A. § 1621 et seq.] of the National Emergencies Act to the extent that the provisions of this section are inconsistent with these provisions.

(d) Periodic reports to Congress

If the President uses the authority of this section to continue prohibitions on transactions involving foreign property interests, he shall report to the Congress every six months on the use of such authority.

(Pub. L. 95-223, Title II, § 207, Dec. 28, 1977, 91 Stat. 1628.)

Supreme Court, U.S.
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No. 93-620

In the Supreme Court of the United States

OCTOBER TERM, 1993

MILENA SHIP MANAGEMENT COMPANY, LTD., ET AL.,
PETITIONERS

v.

R. RICHARD NEWCOMB, DIRECTOR,
OFFICE OF FOREIGN ASSETS CONTROL,
DEPARTMENT OF THE TREASURY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Treasury Department's Office of Foreign Assets Control reasonably determined that vessels operated by petitioners were subject to Executive Orders blocking all property in which the Federal Republic of Yugoslavia has an interest.

2. Whether the court of appeals erred in refusing to issue a writ of mandamus directing the government to maintain petitioners' vessels.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 995 F.2d 620. The order of the district court denying petitioners' motion for summary judgment (Pet. App. 36a-43a) is reported at 804 F. Supp. 859. The order of the district court denying appointment of a custodian (Pet. App. 29a-35a) is reported at 804 F. Supp. 855. The order of the district court denying preliminary relief (Pet. App. 11a-28a) is reported at 804 F. Supp. 846.

JURISDICTION

The judgment of the court of appeals was entered on July 21, 1993. The petition for a writ of certiorari was filed on October 19, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. To combat state-sponsored violence in former Yugoslav territory, President Bush issued two Executive Orders in 1992 that imposed comprehensive sanctions against the unrecognized Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) (hereinafter Yugoslavia). Exec. Order No. 12,808, 3 C.F.R. 305 (1992 comp.), *reproduced at* Pet. App. 46a-49a; Exec. Order No. 12,810, 3 C.F.R. 307 (1992 comp.), *reproduced at* Pet. App. 50a-55a. Among other provisions, the orders instructed the Secretary of the Treasury, in consultation with the Secretary of State, to "block" all property and interests in property of the Yugoslav government. Exec. Order No. 12,808, §§ 1, 2, 5, Pet. App. 46a-48a; Exec. Order No. 12,810, §§ 1, 6, Pet. App. 50a-51a, 54a-55a.

The first of those orders was issued pursuant to powers vested in the President by the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. 1701-1706. Pet. App. 46a. The second order invoked both the IEEPA and the United Nations Participation Act of 1945 (UNPA), 22 U.S.C. 287c. Pet. App. 50a. The executive orders implement sanctions previously adopted by the United Nations in Security Council Res. No. 757 (1992).

b. To implement the executive orders, the Treasury Department's Office of Foreign Assets Control (OFAC) issued orders implementing the blocking of all property located in the United States owned or

PUBLISHER'S NOTE:

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a. Petitioners assert (Pet. 8-13) that OFAC exceeded the scope of the executive orders and violated the Due Process Clause in adopting a presumption that entities located within Serbia and Montenegro are owned or controlled by the Yugoslav government. As the court of appeals held, however, the presumption was a reasonable method of implementing the President's executive orders in light of the history of government involvement in Yugoslav business enterprises and the need for immediate action to enforce the United Nations resolutions. Pet. App. 6a-7a. Nothing in either the text of the executive orders or the Due Process Clause precluded OFAC's adoption of such a presumption, which was reasonably designed to further the purposes of the executive orders.[1]

b. Petitioners contend (Pet. 13-14) that the administrative record does not adequately support OFAC's initial adoption of the presumption that the Yugoslav government owns or controls entities located in Serbia and Montenegro. For the reasons set forth above, however, the agency acted appropriately in adopting the presumption based on its knowledge of prior Yugoslav law and on the absence of any basis for concluding that conditions had significantly changed in Serbia and Montenegro. See Pet. App. 6a-7a, 107a.

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[1] Petitioners err in contending (Pet. 12) that OFAC's conclusion is inconsistent with other judicial and administrative determinations regarding the Yugoslav economy. None of those rulings or statements involved the executive orders at issue here or construed current Yugoslav law, which gives the government a direct financial interest in the "social capital" of Yugoslav business enterprises.

In any event, even if the record had been inadequate to support the agency's initial blocking orders, any such inadequacy would have been more than remedied by OFAC's detailed decision rejecting petitioners' application for unblocking of the vessels. See Pet. App. 102a-118a. Contrary to petitioners' assertions, that decision was not an impermissible "post hoc rationalization[]" (Pet. 13) for the agency's past actions. Rather, in issuing that decision, OFAC properly considered the additional materials submitted by petitioners in support of their application and concluded that the presumption of government control of Yugoslav entities and the continued blocking of petitioners' vessels were justified. Petitioners point to no authority for the proposition that an agency is precluded from relying on all properly submitted materials in considering whether to grant an application for administrative relief, and we are aware of none.

Moreover, if petitioners had sought review of the original emergency blocking notice, and a court had deemed OFAC's explanation inadequate, the appropriate course would have been a remand to the agency to allow it to supplement the record and fully explain its decision. See *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729, 744 (1985). Thus, even if petitioners were correct in claiming that the agency's initial orders lacked record support, they would not be entitled to any relief, because the agency's decision rejecting petitioners' application for unblocking amply demonstrates the propriety of the continued blocking of petitioners' vessels.

c. Petitioners claim (Pet. 15-18) that OFAC misinterpreted Yugoslav law when it concluded that the Yugoslav government has an interest in JOP within

the meaning of the executive orders.[2] That fact-bound contention is incorrect, and does not merit further review.

The court of appeals correctly held that, under any standard of review, the Yugoslav government had an interest in petitioners' vessels. Under the economic system established by the government of the former Yugoslavia, business enterprises were "socially-owned" and were managed by "workers' councils." Pet. App. 107a-108a. In 1989, the government enacted statutes to permit the sale of shares in these "socially-owned" firms. Under those laws, "if the 'social capital' [of the firm] is sold, the proceeds are to be deposited into development 'Funds' established by the governments of each [Yugoslav] republic." *Id.* at 108a. The Funds "appear to be an arm of [the] government" (*ibid.*), and were established to accomplish a variety of governmental purposes, including lending for privatization, public investment in troubled firms, and investments for pensions. *Id.* at 109a, citing Montenegro Law on the Transformation of Management (LOMT), arts. 37, 45.

Alternatively, an enterprise may choose merely to add to its capital by issuing new shares and retaining the proceeds. In that event, the social capital remains in the business and will be claimed by the government if the enterprise is later sold or liquidated. Pet. App. 109a-110a, 114a-115a. JOP selected this

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[2] Petitioners' suggestion (Pet. 15) that the court of appeals gave improper deference to the agency's interpretation of foreign law is without foundation. The court made clear that it would sustain OFAC's decision even applying de novo review. Pet. App. 7a. Moreover, the court could properly have deferred to the expert view of the agency charged with regulation of foreign assets under the executive orders.

latter approach to privatization, and thus the government retains an interest in JOP's social capital. *Id.* at 111a-116a.

In addition to the government's continuing financial interest in the social capital of JOP and similar companies, applicable law gives the government sweeping powers over such entities. For example, under Article 49 of the LOMT, the government is authorized to designate the management of privatized companies and to take over an enterprise under a variety of circumstances, such as when the enterprise sustains a business loss. Pet. App. 112a. As the court of appeals concluded (*id.* at 7a), "society has an interest in each business enterprise" within the meaning of the executive order, even if the scope of the interest cannot be precisely defined. Thus, OFAC properly concluded that Yugoslav law continues to give the government an interest in Yugoslav entities such as JOP.

2. Finally, petitioners contend (Pet. 18-19) that the court of appeals erred in denying their petition for a writ of mandamus directing appointment of a custodian for their vessels. Petitioners do not identify any statutory authority for such an order, however. Instead, they urge that mandamus is required because the blocking order constitutes a taking without just compensation.

Even if we assume *arguendo* that petitioners' taking claim is valid, petitioners are not entitled to the relief they seek. The Fifth Amendment "is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking." *First English Evangelical Lutheran Church* v. *County of Los*

Angeles, 482 U.S. 304, 315 (1987). Thus, even if petitioners had a valid claim for just compensation under the Fifth Amendment, they would have no basis for seeking appointment of a custodian.

3. Finally, even if the questions presented by petitioners were otherwise appropriate for review by this Court, this case would not present a proper vehicle for resolving those questions. Petitioners' claims have effectively been mooted by Exec. Order No. 12,846, 58 Fed. Reg. 25,771 (1993), which blocks all property and interests in property of *all* entities within the territory of the Yugoslav government, regardless of their governmental affiliation. The order further confirms that all expenses incident to the blocking and maintenance of property blocked under that order or Exec. Order Nos. 12,808 and 12,810 "shall be charged to the owners or operators of such property." 58 Fed. Reg. 25,771 (1993). Thus, it is clear that petitioners' vessels are now blocked, and that petitioners' requested mandamus relief is precluded, by the express terms of Exec. Order No. 12,846. Further review is therefore unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 93-620

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

MILENA SHIP MANAGEMENT COMPANY, LTD.,
SOUTH CROSS SHIPPING, LTD.,
SOUTH ADRIATIC BULK SHIPPING LIMITED, AND
GULF & EASTERN STEAMSHIP AND CHARTERING CORP.,
Petitioners,

v.

R. RICHARD NEWCOMB, DIRECTOR,
OFFICE OF FOREIGN ASSETS CONTROL OF THE
DEPARTMENT OF THE TREASURY, AND
JAMES MURRAY, SENIOR SPECIAL AGENT,
UNITED STATES CUSTOMS SERVICE,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

PREFACE

Respondents advance essentially three main arguments in opposition to the petition for a writ of certiorari. First, OFAC claims that it possessed prior "knowledge" of Yugoslav history and law and relied on it to adopt a "reasonable" presumption that the Yugoslav Government

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[1] Petitioners' list of interested persons and Rule 29.1 notation are set forth at page ii of their petition. Those listings remain current, and no amendment is necessary.

owned or controlled every entity in its territory (Opposition Brief, pp. 3, 7). Second, OFAC contends that even if its administrative record failed to support its initial blocking orders, the agency's subsequent decision rejecting petitioners' application for unblocking the vessels "remedied" any inadequacy in the record (p. 8). Third, OFAC asserts that Executive Order No. 12,846, 58 Fed. Reg. 25,771, which President Clinton signed on April 25, 1993 after the final agency actions in this case, blocks the property of all Yugoslav entities regardless of their affiliation to the Yugoslav Government and effectively moots the writ petition (p. 11).

Denying certiorari in favor of respondents' arguments would directly conflict with the rules governing the conduct of administrative agencies review as set forth in the Administrative Procedure Act, 5 U.S.C. §§ 701-706, and this Court's opinion in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971). No statutory or judicial authority permits an administrator to take unlawful final action and then to justify it after the fact through the arguments of counsel. None of respondents' arguments undermines the need to grant the writ application in this case. To the contrary, the opposition brief underscores the reasons why this Court should grant certiorari to address the important questions concerning due process, separation of powers, and proper standards of judicial review that this petition raises.

I. OFAC HAD NO PRIOR "KNOWLEDGE" TO JUSTIFY ITS UNLAWFUL BLOCKING ORDERS AND PRESUMPTION OF GOVERNMENT OWNERSHIP

Throughout its brief in opposition, OFAC asserts that it based its presumption of government ownership on its prior "knowledge" of the Yugoslav regime's involvement in business enterprises (p. 3) and that its presumption of government ownership was "reasonable" in view of that "history" and its "knowledge of prior Yugoslav law"

(p. 7). Unfortunately for OFAC, no evidence in the administrative or judicial record supports that assertion.

In the "Stipulation and Order" entered in the district court on October 2, 1992, OFAC conceded that it had no "additional evidence to offer beyond that which is already in the Court's record of this proceeding" (Petitioners' Appendix, 44a-45a). As petitioners have established, OFAC's administrative record begins over two weeks *after* it took final agency action by seizing the ZETA on June 19, 1992. OFAC's record contains absolutely no documentation indicating that OFAC had any "knowledge" of the Yugoslav economy, JOP's structure, or Yugoslav or Montenegrin law before OFAC took action by blocking the vessels.

In *Overton Park*, cited above, this Court created a rule of law to control administrative agencies who possess the power to take action that may result in the loss of property, such as in this case. This Court recognized an agency's latitude, but held that a reviewing court under the Administrative Procedure Act must set aside the agency's action "if it was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law' or if the action failed to meet statutory, procedural, or constitutional requirements." 401 U.S. at 414-15. In judging whether the administrator acted within the scope of his authority and if the action was justifiable under these standards, the reviewing court looks to the evidence in the administrative record that was before the administrator at the time of the decisive action, not afterward. 401 U.S. at 419-20. The self-interest of the agency and its attorneys in justifying prior conduct by arguments after the fact led this Court in *Overton Park* to prohibit any post hoc rationalizations. Petitioners submit that this Court had cases precisely like this one in mind.

As the rationale for his agency's action in this case, R. Richard Newcomb, OFAC's director, filed a post hoc affidavit in the district court on August 3, 1992 averring

that he had "knowledge of the Yugoslav economy" and had based his presumption on a "review of the historical structure of the Yugoslav economy and the privatization process begun in SFRY in 1989." Yet, he admittedly relied on the article by Branko Vukmir, which plaintiffs' expert on Yugoslav law, Stephen B. Ives, Jr. furnished to OFAC in late July 1992, over a month *after* OFAC had seized the vessels and after petitioners had sought administrative review. In short, the record plainly shows that OFAC acquired its so-called "knowledge" long after the fact. Paradoxically, when confronted with the U.S. Treasury Department's own opinion that the Yugoslav State does not own "socially-owned" industry in Yugoslavia, OFAC eschews its allegedly prior "knowledge" and relies on "current Yugoslav law" to argue that the Government has "a direct financial interest in the 'social capital' of Yugoslav business enterprises" (Opposition Brief, p. 7 n.1).

OFAC's administrative record plainly shows that OFAC had no prior knowledge to justify its unlawful blocking orders. Only after judicial proceedings began did OFAC begin to cover its tracks by creating self-contradictory conclusions to support its so-called "reasonable presumption. OFAC blocked the vessels on the whim, caprice, and prejudice of its director, who felt the need to act, without an investigation or even a simple meeting with the State Department to support its final agency action. This case cries out for this Court's review to prohibit such gross abuses of administrative power in this and future cases.

II. OFAC CANNOT "REMEDY" ITS UNLAWFUL BLOCKING ORDERS AFTER THE FACT

OFAC erroneously relies on *Florida Power & Light Co. v. Lorion*, 470 U.S. 729 (1985), to argue that the agency's administrative decision of September 18, 1992 denying petitioners' application for unblocking of the vessels somehow "remedied" any assumed "inadequacy" in

the administrative record when OFAC initially blocked the vessels (Opposition Brief, p. 8). OFAC has misconstrued this Court's opinion in the *Florida Power* case and is advancing an argument that is directly contrary to this Court's standards of judicial review under the Administrative Procedure Act, 5 U.S.C. §§ 701-706.

In *Overton Park*, this Court held that judicial review of an administrative action must be based "on the full administrative record that was before the [administrative officer] . . . *at the time he made his decision*." 401 U.S. at 420 (emphasis added). This Court rejected affidavits, legal arguments, and other post hoc rationalizations to justify prior administrative action that lacks support in the administrative record. 401 U.S. at 419. The *Florida Power* decision does not give OFAC license to "paper over" its mistakes, concoct post hoc rationalizations for its earlier, final blocking orders, or engage in a "ping pong" game of remand until the agency "cures" its arbitrary action and prevails. *Overton Park* and *Florida Power* simply establish that a remand to the agency may be proper "for a fuller explanation of the agency's reasoning *at the time of the agency action*" and that the agency must give the reviewing court a full record "to provide an explanation that will enable the court to evaluate the agency's rationale *at the time of decision*." *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 654 (1990) (emphasis added). As this Court stated in *Florida Power*, "[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." 470 U.S. at 743, *quoting Camp v. Pitts*, 411 U.S. 138, 142 (1973). As noted earlier, OFAC has stipulated in this case that it has "no additional evidence to offer" (Petitioners' Appendix, 44a-45a).

OFAC does not dispute the lower courts' findings that it took "final agency action" in blocking the vessels beginning in mid-June 1992. The local point of that final

agency action is the administrative record, such as it existed, when OFAC blocked the vessels. *Overton Park* and *Florida Power* do not permit OFAC to invent a new administrative record or to justify the prior blocking orders through a subsequent administrative decision refusing to unblock the vessels months later. The initial blocking orders must stand or fall on their own merits as of the time OFAC imposed them. The administrative and judicial records in this case plainly show that OFAC adopted its unreasonable and arbitrary presumption on an empty record without any prior investigation or consultation with the State Department or any experts in Yugoslav and Montenegrin law. No decision of this Court permits an administrative agency to act first and justify it later with post hoc rationalizations when challenged. The error that this case presents will undoubtedly recur whenever OFAC purports to implement future economic sanctions against foreign governments and harms the rights of innocent parties in the process. Injustices will result and evade review unless this Court gives guidance to OFAC and the federal courts.

III. PETITIONERS' CLAIMS ARE NOT MOOT

On April 25, 1993, while the appeal of this case was pending in the Fifth Circuit, President Clinton signed Executive Order No. 12,846, 58 Fed. Reg. 25,771, blocking the property of "all commercial, industrial, or public utility undertakings or entities organized or located in the Federal Republic of Yugoslavia (Serbia and Montenegro) . . . ." This executive order further provides that all expenses incident to the blocking and maintenance of property blocked under it and earlier executive orders are chargeable to the owners or operators of the property. Respondents now argue that this new executive order moots petitioners' claims and makes further review of this case "unwarranted." (Opposition Brief, p. 11.) That argument is meritless, because OFAC cannot rely on a later executive order to excuse its earlier final agency action beyond the scope of previous executive orders,

especially where "substantial rights affecting the lives and property of citizens are at stake." *See Peters v. Hobby,* 349 U.S. 331, 347 (1955).

The general rule that a court applies the law in effect at the time of its decision is subject to a very important exception. A court cannot apply new law retroactively to a pending case if a "manifest injustice" would result. *See Bradley v. School Board of City of Richmond,* 416 U.S. 696, 716-17 (1974), *citing Thorpe v. Housing Authority of City of Durham,* 393 U.S. 268, 282 (1969); *Greene v. United States,* 376 U.S. 149, 160 (1964). "If the citizen is to be punished for the crime of violating a legislative order of an executive officer, or of a board or commission, due process of law requires that it shall appear that the order is within the authority of the officer, board or commission, and, if that authority depends on determinations of fact, those determinations must be shown." *Panama Refining Co. v. Ryan,* 293 U.S. 388, 432 (1935).

Respondents cannot rely on Executive Order No. 12,846 of April 25, 1993 retroactively to moot this writ application and sanction the unwarranted seizure of petitioners' vessels almost a year earlier under different executive orders. Petitioners had Fifth Amendment rights to the full economic use of their vessels until OFAC arbitrarily, capriciously, and unlawfully deprived them of those rights by blocking the vessels in mid-June 1992. Since the blocking, petitioners have incurred the substantial costs of maintaining these vessels without any benefit. Applying the latest executive order to moot this writ application would condone OFAC's unlawful actions and deprive petitioners of meaningful judicial review to vindicate their constitutional rights.

Retroactively applying Executive Order No. 12,846 would further offend the prohibitions against *ex post facto* laws and bills of attainder in U.S. Const. Art. I, § 9, cl. 3. Under 50 U.S.C. § 1705(b) and under § 585.701 of OFAC's Federal Republic of Yugoslavia (Serbia and

Montenegro) Sanctions Regulations published at 58 Fed. Reg. 13,199, 13,212 (1993), petitioners are subject to criminal penalties (including fines, imprisonment, or both) if they willfully violate any order or regulation issued under the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-1706. Applying the latest executive order to moot this writ petition and to justify the prior unlawful blockings would constitute an *ex post facto* violation by specifically targeting and punishing petitioners and their vessels for past lawful conduct. If applied to petitioners, the latest executive order would retrospectively criminalize a status and events occurring before its enactment, would disadvantage petitioners by punishing them now for earlier lawful acts beyond the scope of the earlier executive orders, and would change the legal consequences of their prior status. *See Collins v. Youngblood*, 497 U.S. 37 (1990); *Miller v. Florida*, 482 U.S. 423 (1987). A retroactive application of Executive Order No. 12,846 would also be a prohibited bill of attainder by inflicting punishment upon petitioners as an identifiable group and confiscating their property without a judicial trial because of their prior status. *See Nixon v. Administrator of General Services*, 433 U.S. 425 (1977); *United States v. Brown*, 381 U.S. 437 (1965). This writ petition is by no means moot.

CONCLUSION

As discussed above and in the petition, this case presents questions of extreme importance. The decisions below upholding OFAC's arbitrary, capricious, and unlawful blocking orders have violated petitioners' constitutional rights, the doctrine of separation of powers, and this Court's standards of judicial review of administrative decisions—particularly as set forth in *Overton Park*. This writ application presents substantial and important reasons for granting certiorari within the meaning of Rule 10.1(a) and (c) of this Court's Rules. This Court should exercise its power of supervision to correct the lower

courts' departure "from the accepted and usual course of judicial proceedings" and to correct the lower courts' prejudicial errors of constitutional and federal statutory law. Unless corrected, OFAC now has license to adopt arbitrary presumptions and deprive citizens of their property at the whim of its administrator. Unless this Court intercedes, this fundamental error will be repeated and evade review in the many future cases when economic sanctions are imposed against foreign governments and the rights of innocent non-governmental entities and persons are jeopardized.

This Court has never hesitated to stop governmental overreaching that infringes on the rights of individuals. This case is the perfect vehicle for this Court to address broad concerns of judicial review and separation of powers with a worldwide impact. More particularly, this Court should grant certiorari to reverse OFAC's unlawful actions that have irreparably injured these petitioners and will continue to do so by unjustly stigmatizing them as entities of a foreign government that in due course may face substantial claims from other citizens and governments. Unless reversed, the administrative and judicial rulings at issue will forever deprive petitioners of their property and may ultimately destroy them. This case warrants this Court's review.

Respectfully submitted,

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